

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF YAVAPAI

FILED

11 O'Clock 10

M

3 STATE OF ARIZONA,

JAN 26 2010

4 Plaintiff,

JEANNE HICKS, Clerk

BY

Deputy

5 vs.

No. CR 2008-1339

6 STEVEN CARROLL DEMOCKER,

7 Defendant.

8
9
10 BEFORE:

THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION 6
YAVAPAI COUNTY, ARIZONA

11
12
13
14 PRESCOTT, ARIZONA
WEDNESDAY, JANUARY 13, 2010
9:51 A.M. SESSION
1:34 P.M. SESSION

15
16
17 REPORTER'S TRANSCRIPT ON PROCEEDINGS

18 Hearing on Motions
19 Brown and Huante Reconstruction
20 Testimony of Douglas Demont Brown
21 Testimony of Luis Huante
22 Death Qualifications Of The Jury Unconstitutional

23 LISA A. CHANEY, RPR, CSR, CR
24 Certified Reporter
Certificate No. 50801

25 ORIGINAL

LISA A. CHANEY, CR, RPR
CERTIFIED REPORTER

January 13, 2010
9:51 a.m.

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER, DEPUTY.
ALSO PRESENT: MS. DEB COWELL, PARALEGAL.
FOR THE DEFENDANT: MR. JOHN SEARS,
MR. LARRY HAMMOND, AND MS. ANNE CHAPMAN.

(Sealed proceedings held in chambers,
Page 1 through Page 19 and not included
as a part of this transcript.)

THE COURT: This is the State versus DeMocker.
We're in the courtroom. I have been meeting with the
lawyers. Tried to efficiently use the remainder of our
time this week in determining what motions to go forward
with and who's going to go forward with them, and I think
we've decided that the motion in limine which is Number 8
on the defense list regarding the reconstruction
video/audio by Detectives Huante and Brown would be the
next sensible one to take up at this point.

Mr. Sears.

MR. SEARS: Judge, I have the order from
yesterday's hearing that Mr. Butner approved form and
content, if we get that, and get started on that.

THE COURT: You can have me file it with the
clerk and then get --

MR. SEARS: We probably ought to do that and

1 get copies made.

2 THE COURT: So file -- if you could take care
3 of making -- what do you need, two copies, Mr. Sears, for
4 you and your side and a copy for the State?

5 MR. SEARS: And we need copies to serve on the
6 sheriff and at least one copy -- two -- four copies.

7 THE COURT: At least four copies, please.

8 Mr. Butner, is it correct understanding that
9 you were wanting to go ahead with Detective Brown and
10 Huante respectively?

11 MR. BUTNER: Yes, that's correct, Judge.

12 THE COURT: Whichever one you wish to call
13 first.

14 MR. BUTNER: Okay. I call Detective Brown to
15 the stand.

16 DOUGLAS DEMONT BROWN,
17 called as witness by the State, having been sworn,
18 testified as follows:

19 THE COURT: Mr. Butner.

20 MR. BUTNER: Judge, we're having trouble
21 getting hooked up here. The problem, I guess, is this is
22 a difficult spot as discerned by the defense earlier.

23 So maybe we'll have to move things around at
24 your table so that she can get connected, I guess.

25 THE COURT: Is this going through an internet

1 connection?

2 MR. BUTNER: I don't know.

3 MS. COWELL: Yes.

4 THE COURT: I don't know how to remedy that,
5 at least right now.

6

7

DIRECT EXAMINATION

8 BY MR. BUTNER:

9 Q. Please state your name for the record.

10 A. Douglas Demont Brown.

11 Q. And what is your occupation, sir?

12 A. I'm a Deputy with Yavapai County Sheriff's
13 Office.

14 Q. Excuse me. Do you want to sit back and relax
15 a little bit, Detective Brown.

16 A. I'm all right.

17 Q. Okay.

18 A. Move it right there.

19 Q. Does that help a little?

20 A. That's fine.

21 Q. Okay. How long have you been so employed?

22 A. I been with the sheriff's office since 2001.

23 Q. And back in July of the year 2008 what were
24 your duties?

25 A. I was assigned as a detective at the time.

1 Q. And in connection with the DeMocker case did
2 you perform investigative functions on that case?

3 A. Yes, I did.

4 Q. Did you have occasion to go out to a trail on
5 the west side of Williamson Valley in an attempt to
6 duplicate the route that Mr. DeMocker described he had
7 traveled on July 2nd of the year 2008?

8 A. I did.

9 Q. And would you tell us when you did that?

10 A. On July 13th of 2008.

11 Q. Would you describe for us the circumstances of
12 that visit to that particular area of Yavapai County on
13 July 13th, 2008?

14 A. On that morning I hiked the trail system off
15 of Williamson Valley Trailhead to attempt to locate the
16 trail of Love Lane and then to further go on and hike the
17 area to see what it was like.

18 Q. And did you meet anybody out there in that
19 particular area to help you do this?

20 A. No, sir.

21 Q. Okay. So on July 13th you hiked this
22 trailhead?

23 A. That's correct.

24 Q. What were you using as your background
25 information to do this hike?

1 A. At the time I just had like forest trail maps
2 and I knew the trail headed up Williamson Valley.

3 Q. And what is the source of your information as
4 to the route that you were going to hike?

5 A. That was from the information Mr. DeMocker
6 shared on July 3rd of where he started his bike ride.

7 Q. Okay. So you went out to the Love Lane area?

8 A. Eventually, yes, I went to Love Lane.

9 Q. When you say, eventually, did you have
10 difficulty finding the Love Lane area?

11 A. I had been out to that area prior. I was not
12 able to locate the trailhead at Love Lane and so I
13 backtracked in to locate that trail.

14 Q. And tell us how you backtracked, so to speak?

15 A. I started at the Williamson Valley Trailhead
16 and headed -- it's south, southwest until I got to the
17 intersection of Trail 347 and 309. 309 goes from that
18 point and ends at Love Lane.

19 Q. Okay. And what's the significance of Trail
20 347 and 309? Had you been provided with those numbers by
21 somebody?

22 A. No.

23 Q. That's just how they're identified?

24 A. That's how they're identified when you're on
25 the trail system.

1 Q. By the forest service?

2 A. Correct.

3 Q. And you say that you backtracked south,
4 southwest from the Williamson Valley Trailhead; is that
5 correct?

6 A. That's correct.

7 Q. Why was it that you were starting out at
8 Williams Valley Trailhead and backtracking, could you
9 explain that to us?

10 A. Yeah. I was not able to locate the trailhead
11 at Love Lane in my prior attempt.

12 Q. And did you think that it was going to be
13 easier somehow backtracking from the Williamson Valley
14 Trailhead?

15 A. I knew if I got to the point it would come
16 out and I would know where it started at. So I could find
17 that out easier.

18 Q. I don't understand what you just said.

19 A. Okay.

20 Q. Please explain that.

21 A. I wasn't able to locate the trailhead at Love
22 Lane.

23 Q. Right.

24 A. So I backtracked and I did the trail system
25 hoping I could find where that trail connected and then I

1 could hike it to a point where it was at Love Lane.

2 Q. I see. And so in this backtracking process,
3 did you ultimately get to the trailhead at Love Lane?

4 A. That's correct.

5 Q. Okay. And would you describe that trailhead
6 for us, please.

7 A. There's no markings at the trail location
8 there. There's a residence on the north side that has a
9 fenced area. There's a -- like a pumphouse on the south
10 side and it starts -- just a small trail at that location.

11 Q. When you say a small trail, would you describe
12 for us basically what it looked like?

13 A. Just a footpath trail. I thought it was just
14 -- like the neighbors. To me it looked like just
15 something that would be on your own property.

16 Q. Was it on private property?

17 A. It's in between two properties. I'm not sure
18 if it's established as being private property or not.

19 Q. Were there any designators there indicating
20 that it was a trail?

21 A. No, there was no designators.

22 Q. So it simply looked like a little footpath
23 going across some private property?

24 A. Correct.

25 Q. And from where did it emanate, so to speak, to

1 go into the trail system?

2 A. That portion of Love Lane, there's kind of
3 like -- it's a dirt road that goes to a rock area and
4 there's just a small area where you can pull off if you
5 need to and so it starts along just shortly after that,
6 that rock area, I guess, and then it goes into a wash.

7 Q. Okay. This rock area, do you mean like rock
8 on the ground, so to speak?

9 A. Correct.

10 Q. Dirt rock?

11 A. Crushed rock.

12 Q. Okay. Sort of a little dirt and crushed rock,
13 parking area?

14 A. It's an area where you can park. I don't
15 think it's established as a parking area.

16 Q. There's nothing to designate it as a parking
17 area?

18 A. No, sir.

19 Q. And the road that leads into that area at that
20 point in time is it -- what kind of surface is that road?

21 A. That's a dirt road.

22 Q. Okay. So in trying to retrace this path, did
23 you record this in any way?

24 A. On that day I just took GPS coordinates.

25 Q. And did you time yourself in terms of

1 attempting to duplicate the road that Mr. DeMocker stated
2 to you he had traveled?

3 A. At the time that I -- yes, I did. I took GPS
4 coordinates and I took time notations down.

5 Q. Okay.

6 THE COURT: Is this still on the 13th?

7 THE WITNESS: Correct.

8 THE COURT: All right. Go ahead.

9 MR. BUTNER: Thank you, Judge.

10 Q. And so you -- did you start your timing when
11 you were at the Love Lane entrance, so to speak, to this
12 trail?

13 A. Yeah. I think that -- I believe that I
14 started times at Williamson Valley to get to the Love Lane
15 but my main reason for going there was then I started
16 times at Love Lane and going into the trail system in the
17 direction that Mr. DeMocker had told us.

18 Q. So the time that you went from Williamson
19 Valley to Love Lane that wasn't part of the time that
20 Mr. DeMocker told you he traveled the trail, right?

21 A. That's correct.

22 Q. So you didn't count that time, right?

23 A. I documented but that wasn't the reason for
24 going there. I was just documenting to show I was there.

25 Q. And then when you got to Love Lane, you then

1 began timing anew, so to speak?

2 A. That's correct.

3 Q. Okay. And tell us the route that you
4 traveled, please.

5 A. From Love Lane -- that's the Trail 309 -- I
6 took that and it heads for the most part west. A little
7 southwest, connects into 347, and then I hiked 347 all the
8 way to the end which ends at a road called Katahn.

9 Q. Would you spell that road.

10 A. I believe it's K-a-t-a-h-n.

11 Q. And where is Katahn Road located?

12 A. It's south, southwest. It's a road that comes
13 off of Williamson Valley further down south.

14 Q. Okay. Did Mr. DeMocker mention to you that he
15 had gone to Katahn Road?

16 A. No, sir.

17 Q. Why did you go to Katahn Road then?

18 A. I traveled that 347 until it dead-ended, which
19 along that road I passed a -- junctions that were going to
20 areas that would go to Granite Basin Road. I just went to
21 the one that I believed was the longest standing trail.

22 Q. Okay. And how long did it take you to get to
23 Katahn Road?

24 A. It was either one hour and thirty-five minutes
25 or one hour and twenty-five minutes.

1 Q. And what accounts for your confusion?

2 A. I can look and see my report for sure. I just
3 don't recall.

4 Q. You brought it with you?

5 A. Yes, sir.

6 Q. Would you please refer to that report to
7 refresh your recollection. By the way, what supplement
8 number are you looking at?

9 A. That would be Number 30. One hour and
10 twenty-six minutes.

11 Q. Okay. And --

12 THE COURT: And before -- so that this is in
13 context for me, is that from Love Lane start to Katahn or
14 is that from Love Lane start to Katahn and back again to
15 Love Lane?

16 THE WITNESS: Just Love Lane to Katahn and
17 ending. So start at Love Lane and end at Katahn.

18 THE COURT: That was one hour?

19 THE WITNESS: And twenty-six minutes.

20 THE COURT: Twenty-six minutes. Thank you.

21 BY MR. BUTNER:

22 Q. Okay. Now, had you been given information
23 that Mr. DeMocker had gone to some sort of landmark aside
24 from Katahn Road which he didn't tell you about?

25 A. No, sir.

1 Q. So you didn't have any idea where his end of
2 his trail would have been?

3 A. No, sir.

4 Q. Well, were you looking for a trail that had
5 something to do with the shooting range?

6 A. Not on that day. I was not aware of anything
7 that had to do with the shooting range.

8 Q. All right. So ultimate -- did you find
9 anything of significance while you were going along this
10 trial, any markers, or anything like that that you were
11 looking for?

12 A. On that day I was not looking for any markers
13 or anything. I was just hiking that day.

14 Q. Okay. And did you then retrace your tracks
15 back to the Love Lane route or the Love Lane start, I
16 should say.

17 A. No. On that day I actually got a ride back to
18 my truck.

19 Q. Where was your truck parked?

20 A. At the Williamson Valley Trailhead.

21 Q. Okay. Did you revisit the trailhead --

22 A. Yes, I did.

23 Q. -- after that?

24 When was that?

25 A. The first time that I revisited that trail

1 system would be on the 15th.

2 Q. On the 15th of July?

3 A. That's correct.

4 Q. In 2008?

5 A. That's correct.

6 Q. And did you meet anybody else out there on
7 that day?

8 A. On that date I went there with Sergeant Huante
9 and we met with Miss Rene Gerard.

10 Q. Approximately what time was it that you met
11 out there?

12 A. Approximately 9 in the morning.

13 Q. And what was the purpose of going back to the
14 trail on the 15th of July?

15 A. I contacted Miss Gerard prior to that and
16 advised that I had hiked the system and that I was not
17 sure if I was at the correct location. So I asked if she
18 could show me where that location was.

19 Q. And for what reason were you asking Rene
20 Gerard to show you where the location was?

21 A. While speaking with her she had mentioned that
22 she went out to the system with Mr. DeMocker and he showed
23 her where he'd been hiking or went riding.

24 Q. Riding his bike?

25 A. That's correct.

1 Q. When did she tell you that?

2 A. I'm not sure if it was on that same date or
3 the day prior.

4 Q. Okay. And so what time did you meet her out
5 there on July 15?

6 A. Approximately 9 in the morning.

7 Q. And Sergeant Huante was with you?

8 A. That's right.

9 Q. And what took place when you got there on July
10 15?

11 A. We met -- there's a little turn-off that goes
12 to the shooting range. We met there and then she tried to
13 direct us to the location of the trailhead where they
14 started their hike.

15 Q. And where is the shooting range located
16 relative to some landmark?

17 A. The shooting range is on Granite Basin Road
18 off of Iron Springs.

19 Q. So you came into the trail system then from
20 the opposite end, so to speak, rather than out of
21 Williamson Valley Way, you were on the other side of it
22 near Iron Springs Road and Granite Basin?

23 A. That's correct.

24 Q. And the shooting range is located some place
25 on that end?

1 A. Just a short ways north of Iron Springs Road.

2 Q. And why was the shooting range of significance
3 on that day?

4 A. I think that was just the location that we
5 decided to meet which is the first pull-off on Granite
6 Basin Road.

7 Q. Okay. And so you met Rene Gerard at the
8 shooting range?

9 A. At the turn-off to the shooting range.

10 Q. And Sergeant Huante was with you?

11 A. That's right.

12 Q. And what took place when you met Rene Gerard
13 and Sergeant Huante at the shooting range turn-off of
14 Granite Basin Road?

15 A. We then followed her in her vehicle. We were
16 in our vehicle. She was in her vehicle. We followed her
17 to try to locate the area where they parked and started
18 the hike.

19 Q. And Rene Gerard had told you that Mr. DeMocker
20 had taken her out to this location before?

21 A. Correct.

22 Q. And explained to her that that was where he
23 was riding his bicycle on the evening of the murder?

24 A. That's correct.

25 Q. So where did she take you?

1 A. We drove up Granite Basin Road and got to the
2 area just prior to the lake and we pulled off there. At
3 that time she wasn't sure if she was at the right
4 location. So we stopped and we talked and we tried to
5 figure out what the location might have been and we
6 decided it was possibly the Cayuse Trailhead.

7 Q. When you say we, you didn't know where the
8 location was, did you?

9 A. Correct. We were just --

10 Q. I'm sorry. Go ahead.

11 A. That's correct. At that time I think I had a
12 map and we were using the map to try to figure it out.

13 Q. And you were showing the map to Rene Gerard?

14 A. That's correct.

15 Q. And did she try to figure out where the
16 location was that Mr. DeMocker had shown her?

17 A. That's correct.

18 Q. Did she ultimately arrive at a spot, so to
19 speak --

20 A. Yes, she did.

21 Q. -- or conclusion as to the location?

22 A. That's correct.

23 Q. And where was that?

24 A. At the Cayuse Trailhead.

25 Q. And could you give us an idea where the Cayuse

1 Trailhead is located?

2 A. It's just north of the shooting range. I'm
3 not sure approximately the distance. It's on the right
4 side of Granite Basin Road when you're coming north and
5 it's the pull-off thing -- you pull off into there and
6 there is an equestrian area and then a hiking trail kind
7 of thing, place.

8 Q. Did you record this meeting in some fashion
9 with Rene Gerard?

10 A. Yes, I did.

11 Q. How did you record it?

12 A. A digital recording.

13 Q. And did you bring a copy of that recording
14 with you today?

15 A. Yes, we did.

16 Q. Is it over here on our desk?

17 A. Yes, that's correct.

18 (Mr. Butner and Ms. Cowell confer.)

19 (Mr. Butner and the defense counselors confer.)

20 MR. BUTNER: I just need to get this marked,
21 Judge. We're still not able to get connected over there.
22 Do you want to move around the table a little bit?

23 MS. COWELL: I can try. It will take me
24 awhile to try it in a different locations.

25 MR. BUTNER: That's fine with me. I'll try

1 and stay out of the way.

2 THE COURT: Jury box.

3 MR. HAMMOND: Do you need to be able to
4 connect to your office?

5 MS. COWELL: It's by the internet.

6 MR. BUTNER: Thank you.

7 Q. Let me show you what's been marked as Exhibit
8 163. And do you recognize what that is?

9 A. No.

10 Q. Oh, okay. So that isn't the recording?

11 A. No.

12 Q. Where is your recording?

13 A. It's was saved on the computer. It's just a
14 DSF file.

15 Q. So -- okay. So we don't have a copy of your
16 recording with us then?

17 A. No. I mean, it's -- I don't have a CD copy if
18 that's what you're asking for.

19 THE COURT: Do you want me to release the
20 number and indicate that?

21 MR. BUTNER: Judge, I'd like to have this
22 unmarked apparently.

23 THE COURT: I'll vacate the number -- vacate
24 the number and we'll release what otherwise was marked
25 163.

1 MR. BUTNER: I'm sorry. Well -- and --

2 THE COURT: Since I guess we don't have any
3 real idea what 163 was going to be or was?

4 (Mr. Butner and Ms. Cowell confer.)

5 MR. BUTNER: Sorry, Judge.

6 Q. Do you have a memory stick with you today?

7 A. Yes, I do.

8 Q. So it's on your memory stick?

9 A. That's correct.

10 MR. BUTNER: Okay. Judge, with the Court's
11 permission if we could -- I don't know what we do with
12 that.

13 MS. COWELL: I can play it but and I can't
14 make copies of it.

15 MR. BUTNER: Okay. I'll just ask.

16 Q. How long is this recording, Detective Brown?

17 A. I believe approximately 29 minutes.

18 Q. Okay. And you could make a copy of it at the
19 break?

20 A. Yeah. If you need a copy.

21 Q. Yeah. We could make a copy at the break and
22 put your copy into evidence. On this recording, you've
23 listened to it, I take it?

24 A. That's correct.

25 Q. And basically what occurs at the beginning of

1 the recording?

2 A. It's just when we have our contact with
3 Miss Gerard and we're attempting to locate the location
4 where they started up to the point where she decides that
5 its the location. She made a phone call to Mr. DeMocker
6 to see if she was at the correct place because she wasn't
7 sure at first.

8 Q. Right.

9 A. And then once we established that, that was
10 the correct area, she left at that time.

11 Q. She left at that point in time?

12 A. Correct.

13 Q. And what did you use the remainder of the
14 recording for then?

15 A. After she left that's the end of the
16 recording.

17 Q. Okay. We'll go ahead and get that into
18 evidence a little bit later.

19 A. Okay.

20 Q. Okay. So once you established where the
21 beginning -- the trailhead was for Mr. DeMocker's ride, at
22 least as informed to you by Miss Gerard, what did you do?

23 A. During the contact with her she mentioned that
24 they had flagged -- when they were there hiking it that
25 they had flagged a small bush with, I believe, it was pink

1 ribbon or flagging on the first third of the trail --

2 Q. Let's back up.

3 A. -- from that point.

4 Q. Just a second. So Miss Gerard told you that
5 she had hiked the trail with Mr. DeMocker?

6 A. Well, she explained they started at the Cayuse
7 Trailhead and hiked to Love Lane and then returned.

8 Q. And somewhere along the way they had flagged a
9 small bush?

10 A. That's correct.

11 Q. And so with that information in mind what did
12 you do?

13 A. I recalled that when I had hiked on the 13th
14 that I saw a pink flagged bush at that time.

15 Q. Okay. And then did you attempt to duplicate
16 the path of travel by Mr. DeMocker?

17 A. On that day I didn't go.

18 Q. On the 15?

19 A. On the 15th, I did not go all the way back to
20 Love Lane. I just hiked Trail 346 to Trail 347 and then
21 it makes a loop that comes back to the Cayuse Trailhead at
22 a different location.

23 Q. Now, Trail 346 that's the first time I heard
24 that number come up. Is that a trail that goes from that
25 Cayuse Trailhead?

1 A. That's correct.

2 Q. And is that the trail that goes to Trail 347
3 which is as I understand it you described as the trail
4 that goes to Love Lane?

5 A. That's correct.

6 Q. Okay. Is there any other trail that goes to
7 Love Lane from that area?

8 A. Trail -- there's different ways to get to
9 Trail 347 but Trail 347 is the only one that connects to
10 the Love Lane Trail.

11 Q. Okay. So you could have gone on a different
12 trail other than 346 to get to Trail 347?

13 A. That's correct.

14 Q. The way that you went to get to Trail 347 is
15 that the way that Rene Gerard directed you?

16 A. Yes.

17 Q. I see. And then once you got to 347, as you
18 stated earlier, you went all the way to Love Lane?

19 A. Not on the 15th.

20 Q. But not on the 15th?

21 A. Correct.

22 Q. Sergeant Huante was with you that day, right?

23 A. That's correct.

24 Q. What was he there for?

25 A. Just to -- he was out there with me just to

1 find out where the location was, if we could find out
2 where the location Mr. DeMocker was.

3 Q. And did he go on the trail that day?

4 A. No. When I hiked it he stayed at the parking
5 area.

6 Q. And when you came back you informed him as to
7 where you went?

8 A. Correct.

9 Q. So you didn't hike the whole trail and time it
10 then from the Cayuse Trail on the 15th?

11 A. No. I had a limited amount of time. I just
12 did a quick loop.

13 Q. Are you aware as to whether anybody else hiked
14 the whole trail and timed it?

15 A. I did at a later date.

16 Q. When was that?

17 A. If I could check my notes quickly.

18 Q. Sure.

19 A. May 29th of 2009.

20 Q. Okay. Between that day on July 15th and May
21 29th at 2009, did somebody else from the sheriff's office
22 go out there and either ride or hike the whole trail?

23 A. Yes, sir.

24 Q. And who was that?

25 A. Sergeant Huante.

1 Q. So on May 29th of 2009 where did you begin?

2 A. At that time I started my ride at a parking
3 area off of Rainmaker, actually, off of Levie Lane.

4 THE COURT: Off of which lane?

5 THE WITNESS: Levie, L-e-v-i-e.

6 THE COURT: Thank you.

7 BY MR. BUTNER:

8 Q. And why did you start it at Levie Lane?

9 A. To the best of my ability that was the area
10 where Mr. DeMocker advised that he had parked.

11 Q. And how did -- what was the Levie Lane's
12 relationship with Rainmaker, so to speak?

13 A. Levie Lane -- Rainmaker kind of makes a left
14 turn and turns into Levie Lane for the most part.

15 Q. So Rainmaker becomes Levie Lane, in essence?

16 A. Correct.

17 Q. And was there specific information imparted to
18 you by Mr. DeMocker that caused you to go to that area on
19 Levie Lane?

20 A. Just after reviewing the interview with him --
21 I mean, his map, that was the best area that I could tell
22 that looked like he had parked.

23 Q. What was it that Mr. DeMocker told you that
24 caused you to think Levie Lane was the spot?

25 A. It was an area up on a hill on a roadway that

1 kind of ran north/south. There were no houses in that
2 area.

3 Q. And did that fit the description that
4 Mr. DeMocker had given you?

5 A. It did.

6 Q. And so you took your bike with you on May
7 29th?

8 A. That's correct.

9 Q. And did you time this route?

10 A. Yes, I did.

11 Q. Tell us the route that you took precisely,
12 please.

13 A. I started on my bicycle at that parking area.

14 Q. On Levie Lane?

15 A. On Levie Lane. Headed north to -- it turns
16 into Rainmaker and then headed down hill which goes to the
17 east. If I can check my notes. I don't recall the name
18 of the street that I turned left on.

19 Q. You need to refer to your report to refresh
20 your recollection?

21 A. Yes, sir. And it's Report Number 107.

22 Q. Okay. Did you find it?

23 A. Still looking. Still looking. I don't have
24 it written down exactly what that street name is.

25 Q. Okay.

1 A. It connects into Boone Court which then
2 connects into Love Lane.

3 Q. Okay. So down the hill to the east on some
4 street whose name you don't recollect?

5 A. No. It would be east on Rainmaker and then
6 north on the street which I can't recall.

7 Q. And that goes to Boone Court?

8 A. Correct.

9 Q. And what's the significance of Boone Court?

10 A. Boone Court has an access which connects into
11 Love Lane.

12 Q. Boone Court then connects to Love Lane?

13 A. Correct.

14 Q. And then from Love Lane where did you go?

15 A. That's the area where that small trail is by
16 the residence.

17 Q. Right.

18 A. And at that point you are on trail -- which
19 trail, Number 309.

20 Q. 309?

21 A. Correct.

22 Q. And Trail 309 where does that go?

23 A. That's the one that connects into Trail 347.

24 Q. Is there any other way to get to -- is there
25 another trail that goes from Love Lane to 347?

1 A. Not that I'm aware.

2 Q. That's the only one, 309?

3 A. Correct.

4 Q. Would you describe what that trail is like?

5 A. It's starts out like a small footpath. It
6 goes to a wash -- a dry wash area. It's rocky at that
7 point. It's a fairly narrow trail and I can give you the
8 distance on that if you need that too, the 367.

9 Q. Pardon?

10 A. I can give you the distance of that trail if
11 you need that.

12 Q. Okay. How far is it until you get to 347?

13 A. It's approximately .52 miles.

14 THE COURT: From where to where?

15 THE WITNESS: From the area of Love Lane to
16 the intersection of 309 and 347.

17 THE COURT: .52?

18 THE WITNESS: Correct.

19 BY MR. BUTNER:

20 Q. Okay. And this is a trail that you described
21 as a rocky, dry wash; is that correct?

22 A. A section of it. It's in the dry wash.

23 Q. A section of Trail 309?

24 A. 309 starts off by the residence. It's a small
25 footpath. It's in the dry wash for just a short time and

1 then it's just kind of a narrow trail that winds and goes
2 up and down until it connects into the 347.

3 Q. Right. So the section of the Trail 309 is a
4 rocky, dry wash area?

5 A. A portion of it is, yes.

6 Q. But it gets better then?

7 A. It gets out of the wash and then kind of runs
8 along side the hillside until it gets to the Trail 347.

9 Q. Did you see any bicycle tracks or anything in
10 Trail 309?

11 A. None that day.

12 Q. Okay. And are you going uphill or downhill?

13 A. A little bit up --

14 Q. On 309?

15 A. A little bit up and down.

16 Q. And do you know --

17 A. It's fairly flat between the two. It's kind
18 of in the valley.

19 Q. And then you got to Trail 347?

20 A. Correct.

21 Q. And would you describe for us that trail,
22 please.

23 A. Trail 347 is a more well-traveled trail. It's
24 a lot wider.

25 Q. How wide?

1 A. In sections I'd say three feet wide. In other
2 sections a little bit narrower.

3 Q. And what is the ground like on Trail 347?

4 A. Loose dirt.

5 Q. Is it good riding for a mountain bike or is it
6 difficult riding for a mountain bike on Trail 347?

7 A. I think it's good riding for a mountain bike.

8 Q. And in terms of up and down and so forth, what
9 is the incline, so to speak, of that trail, if there is
10 one?

11 A. It is relatively flat with up and downs
12 throughout and turns.

13 Q. Okay. And where does it go from where to
14 where?

15 A. At that -- at the intersection of 309 and 347
16 I went south, southwest.

17 Q. To where?

18 A. I connected into the 346 intersection.

19 Q. And at 346 intersection that's the one that --
20 the little bit of trail that you described earlier that
21 goes to the Cayuse Trailhead?

22 A. That's correct.

23 Q. And did you go all the way to Cayuse
24 Trailhead?

25 A. Yes, I did.

1 Q. So this was the route that you attempted to
2 duplicate in terms of Mr. DeMocker's route of travel as
3 explained to you by Rene Gerard?

4 A. That's correct.

5 Q. And how long did it take you to get there
6 starting up at Levie and going all the way to Cayuse
7 Trail?

8 A. I'll refer to my notes on that. To do that
9 ride from Levie to Cayuse Trail was one hour and
10 thirty-five minutes.

11 Q. And then after riding there --

12 A. I made a mistake on that. I apologize. It
13 took me one hour to ride that one way.

14 Q. So instead of one hour and thirty-five
15 minutes. You're telling me that it took one hour to ride
16 that?

17 A. That's correct.

18 Q. Okay. And then once you got to the Cayuse
19 Trailhead, what did you do?

20 A. I walked my bicycle back the route.

21 Q. Walked your bicycle back the entire way?

22 A. Correct.

23 Q. What was your height and weight on that date?

24 A. 5' 11", approximately 170.

25 Q. And how long did it take you to walk your

1 bicycle back from the Cayuse Trailhead to the place -- you
2 walked it back to the place where you parked your car; is
3 that correct?

4 A. Correct.

5 Q. How long did it take you to do that?

6 A. That's the one hour and thirty-five minutes.

7 MR. SEARS: I'm sorry?

8 MR. BUTNER: One hour and thirty-five minutes.

9 MR. SEARS: Could we have just a minute.

10 (Mr. Sears and Mr. Hammond confer.)

11 MR. SEARS: Thank you. Pardon the
12 interruption.

13 BY MR. BUTNER:

14 Q. And for what reason did you walk your bike on
15 the way back?

16 A. That most represented what Mr. DeMocker
17 advised had taken place on that night.

18 Q. You mean, you walked his way back because he
19 had had a flat fire?

20 A. That's correct.

21 Q. So the entire trip took you two hours and
22 thirty-five minutes?

23 A. That's right.

24 Q. And when you went on this trip did you find
25 the place where you had seen the bush that was flagged?

1 A. On May 29th, no.

2 Q. You weren't able to remember where you had
3 seen that flag?

4 A. No.

5 Q. Do you remember relative to the Cayuse
6 Trailhead or some other landmark where you had observed
7 that flag on a bush when you went by that first time when
8 you noticed it?

9 A. I thought it would be in that trip that I had
10 taken on the 15 when I did the loop.

11 Q. Okay.

12 A. But I did not find it that date.

13 Q. But what I'm getting at is, do you recall
14 where that flag was located?

15 A. Oh, I recalled -- I looked for a bush that was
16 similar but the bush that I saw on the day on the 29th it
17 didn't have flagging at that time.

18 Q. Right. And where along the trailhead was that
19 bush located?

20 A. It would be within that loop.

21 Q. I understand. Within the loop -- the entire
22 loop you're talking about, right, from 346 all the way out
23 to 309 with 347 in-between?

24 A. No. It would be -- there's the loop around --
25 the Cayuse Trailhead would be -- it would be 346 to 347.

1 I believe it connects into 348 to 351 which takes you to
2 the north part of Cayuse Trailhead.

3 Q. I'm confused.

4 A. There is --

5 Q. I thought you went on 346 to Trail 347?

6 A. Correct.

7 Q. And I thought at some point in time when you
8 were on 346 going to 347 or on 347 you saw a flag on a
9 bush?

10 A. Correct. What I recall on the 13th that I was
11 there, there was a bush that was on 347. In -- I'm
12 getting confused from one direction to the next. The date
13 we met Miss Gerard we were going in the opposite
14 direction.

15 Q. Right?

16 A. That bush was in the area on 3 -- on Trail 347
17 before you get to another intersection which is a little
18 T off that goes 348. So I thought it was in-between that
19 spot.

20 Q. Okay. So it was -- the bush was located on
21 Trail 347?

22 A. From what I recalled, yes.

23 Q. And approximately how far away from the Cayuse
24 Trailhead was the bush located to your recollection?

25 A. I'd say from the intersection of 346 and 347

1 approximately half mile. I don't recall how long 346 is,
2 that little Section 346 is.

3 Q. Okay. And -- okay. So actually when you were
4 duplicating Mr. DeMocker's route of travel, you walked
5 your bike a longer period of time than Mr. DeMocker would
6 have walked it because you walked your bike all the way
7 from Cayuse Trail out to Levie; is that correct?

8 A. For the most part. Miss Gerard didn't believe
9 that he had come all the way into the trailhead but she
10 was not exactly sure where his turn around point was. So
11 she couldn't give me a definite where his turn around
12 point was. As far as that trail, I went the furthest I
13 could go on that trail.

14 Q. On what trail?

15 A. Trail 346 because I went all the way to the
16 parking area.

17 Q. So you actually lengthened Mr. DeMocker's
18 ride, so to speak?

19 A. If he was on Trail 346 and turned around 346,
20 yes.

21 Q. And then you actually walked further than
22 Mr. DeMocker would have walked if he had walked from the
23 point of the bush with the flag back to Love Lane?

24 A. With that question I'm not sure if I can --
25 I'm not -- the bush is definitely a shorter distance. I

1 don't know how much further from that bush he was. I'm
2 not positive about that.

3 Q. Right. I understand that you're not positive
4 about how far he went toward the Cayuse Trailhead and
5 turned around?

6 A. Correct.

7 Q. Right.

8 A. Correct.

9 Q. But what Mr. DeMocker told you was he had a
10 flat tire and basically this flat tire occurred where he
11 crashed into the bush?

12 A. No, he didn't advise that.

13 Q. Oh, okay. I understand. Did you find out
14 from Mr. DeMocker where he had his flat tire?

15 A. No. He didn't have an exact location where he
16 had his flat tire.

17 Q. Did he have it on his outbound route of ride
18 or upon his return ride back toward Levie and Love Lane?

19 A. From the -- what Miss Gerard advised the bush
20 was on the left side while traveling from 346 to 3 -- back
21 to Love Lane. So it would have to be on his return route
22 when he cut -- hit the bush.

23 Q. I know, but that wasn't my question. My
24 question was did Mr. DeMocker have his flat tire on his
25 ride out or on his ride back?

1 A. I don't think he advised if he had it on the
2 way out or on the way back.

3 Q. You assumed he had it on the way back, right,
4 or he wouldn't kept riding, going out?

5 A. Correct.

6 Q. And were you present when Detective --
7 Sergeant Huante road this route on his mountain bike?

8 A. No, sir.

9 Q. Okay. So this ride that you described for us
10 is the one that you took on May 29th of 2009?

11 A. Correct.

12 MR. BUTNER: All right. I have no further
13 questions of this witness at this time.

14 THE COURT: Mr. Sears.

15 MR. SEARS: Might we take a small recess here
16 before we start?

17 THE COURT: We'll take five minutes. We'll
18 stand in recess.

19 (Whereupon, a break was taken.)

20 THE COURT: Counsel, defense counsel are
21 present. We're continuing in the DeMocker matter.

22 Mr. Sears.

23 MR. SEARS: Thank you, Your Honor.

24

25

CROSS-EXAMINATION

BY MR. SEARS:

Q. Deputy Brown, I have here on the easel this topographic map that we've looked at a number of times already in this case. Can you see it from where you are sitting?

A. Yes, sir.

Q. Let's see for the sake of Judge Lindberg if we can try and orient ourselves again to this area. Up in the upper right hand corner of this map is Rainmaker, Love Lane, and Boone Court, and then shows an orange trail, 309 coming, and intersecting Trail 347.

Do you see where I'm describing?

A. Yes, sir.

Q. A portion of this area from up on Rainmaker, and I think is Levie Lane perhaps or maybe this is Levie Lane here, correct?

A. No, it's not, correct.

Q. Where would Levie Lane be on the map?

A. May I get up and point?

Q. Please.

A. This map, Rainmaker continues up and then turns.

THE COURT: Hold there. I can't see.

Go ahead.

1 THE WITNESS: Rainmaker continues up and makes
2 a left turn somewhere up in here (pointing). Would be
3 left.

4 By MR. SEARS:

5 Q. It's not shown on this map. Rainmaker wasn't
6 paved perhaps when this map --

7 A. Correct. And I'm not positive on this but I
8 think Levie Lane does connect down and ties in there.

9 Q. This might be Levie Lane right here
10 (indicating)?

11 A. Possibly. It all connects in. I know this
12 section is considered ---

13 Q. You can see some drawings here in pen.
14 There's a rectangle there. And if you remember we were
15 trying to estimate where on this map the continuation of
16 Rainmaker might have been, correct?

17 A. I don't recall that, no, but I don't remember.
18 I didn't do these drawings so --

19 Q. When you started this May 29th, 2009, ride was
20 down here on Levie down at Williamson Valley or some point
21 up the hill?

22 A. No. Up here somewhere (indicating). Wherever
23 Levie Lane is.

24 Q. Up on the flat ground there?

25 A. Correct.

1 Q. And you went -- you then went across heading
2 sort of northwest to Rainmaker and then down Rainmaker and
3 did you go across on Boone Court?

4 A. Yeah. This (indicating) is the street I can't
5 recall the name. I think it starts with a C. I can't
6 recall.

7 Q. Is that where Mr. DeMocker told you he had
8 ridden?

9 A. He didn't give the street names besides
10 Rainmaker and Love Lane.

11 Q. Okay. So you don't know as you stand here
12 today whether this first part starting up here on Levie --
13 and it's Levie. I know the Levie Family. It's was their
14 property -- on Levie and Rainmaker as you go across you
15 were interpreting Mr. DeMocker's route as opposed to
16 trying to follow what he told you when you got to this
17 unnamed street that goes over to Boone Court, that's just
18 what you thought, correct?

19 A. I was just advised he went down to the hill to
20 go down the trail.

21 Q. But he could have gone, for example, further
22 down the hill on Rainmaker and gone across? I think this
23 is Norris perhaps that goes across Love Lane and back up.
24 You just don't know, correct?

25 A. Correct.

1 Q. Okay. And then -- you can resume your seat
2 here. I think this maybe a good time since the Judge is
3 right here. We could talk a little bit about this end of
4 the trail if you want to step down again.

5 Talking about the 346, 347 loop that you did
6 on July 15, 2008 -- I don't want to stand in front of
7 anybody here. Can you see that loop on this map?

8 A. The quick run that I did on July 15?

9 Q. That you did when Sergeant Huante was waiting
10 in the car for you.

11 A. That would be at the Cayuse Trailhead here
12 (indicating). Here to 348 to 351 back to the trail.

13 Q. Okay. So to be clear on July 15th, 2008, you
14 didn't walk that part of 367 from this intersection here
15 with 348 all the way back up to Love Lane on 309, you
16 didn't have time to do that, correct?

17 A. That's correct.

18 Q. You did this but you're not suggesting that
19 you believe that Mr. DeMocker road on any other trails
20 that night other than 309 and 347, are you?

21 A. Just from what Miss Gerard advised from 309 to
22 347 and then somewhere to the 346. So those three.

23 Q. Okay. Trail 347 comes down and these are
24 gates, these lines across the trail, aren't they? Do you
25 remember those gates there?

1 A. Correct. There's two gates.

2 Q. Okay. So Miss Gerard was telling you that she
3 believed that Mr. DeMocker was telling you that he'd
4 ridden 347, past the intersection with 346, and then went
5 back this way on 346 some way?

6 A. When they did their hike she just advised they
7 started here and walked to Boone Court.

8 Q. Well, did she tell you that they started there
9 or that that's where Mr. DeMocker said he turned around on
10 his bike?

11 A. She was not exactly sure where he turned
12 around on his bike.

13 Q. So is it possible that Mr. DeMocker simply
14 road his bike on 347 perhaps just pass this first gate
15 before he ever got to the intersection 346?

16 A. Is that possible?

17 Q. Yes.

18 A. Yes, sir.

19 Q. You just don't know?

20 A. Correct.

21 Q. Okay. And you said that at some point
22 Miss Gerard got Mr. DeMocker on her cell phone and was
23 asking him questions?

24 A. Correct.

25 Q. And did she relay the information from him to

1 you?

2 A. Yes, she did.

3 Q. Okay. And what information did she tell you
4 she was getting from Mr. DeMocker on the phone that day?

5 A. That this was the correct area that we were
6 parked.

7 Q. Okay. And you said the first time that you
8 walked this trail, you went all the way down 347 to where
9 this T and circle is where the trailhead is Katahn, this
10 HoKayGan Subdivision, correct?

11 A. That's correct.

12 Q. You just didn't know where it went exactly.
13 You wanted to see where the end of the trail was?

14 A. Right.

15 Q. And that certainly wasn't anything that
16 Mr. DeMocker told you about going to the Katahn Trailhead,
17 had he?

18 A. He didn't tell us about any of the trial
19 division, or anything.

20 Q. On this portion of the trail -- let's just
21 talk generally as you come on 347 heading more or less
22 southbound here, there is a place where there's cattle
23 pens, correct, do you remember that?

24 A. Cattle pens?

25 Q. Big corrals. Empty cattle corrals. Remember

1 those? They were right here by the Stringfield Spring
2 because they belong to Ralph Stringfield. You don't know
3 what I'm talking about?

4 A. I don't know.

5 Q. Do you remember an area just past those cattle
6 pens where it's very rocky and it is goes -- as you're
7 going down 347 heading on the outbound leg it's very rocky
8 and it's uphill along the fence line? Does that ring a
9 bell?

10 A. I recall a rocky area but I can't tell you
11 where it is.

12 Q. When you were riding your bike was there
13 anyplace where you had to get off and either carry your
14 bike or walk your bike because you couldn't just pedal
15 through it?

16 A. Yes.

17 Q. Can you tell me where that was?

18 A. No. I recall a spot up here (indicating)
19 where I think I was stopped.

20 Q. You're pointing on this map to an area on 347
21 just before it intersects with 346?

22 A. Right. There's kind of a steep incline here
23 (indicating). Somewhere in here (indicating). I don't
24 know exactly where. In here (indicating) there's some ups
25 and downs and I recall I had to get up and walk my bike

1 out. I don't know where it is in relation to anything but
2 there was some steep areas and loose rocks and I was able
3 to keep on.

4 Q. Were you able to ride your bike on Trail 309
5 from Boone Court all the way to the junction 347 without
6 getting off?

7 A. No.

8 Q. You had walked your bike up here somewhere?

9 A. I walked my bike a lot there.

10 Q. That's pretty rocky and a narrow circle track?

11 A. Correct.

12 Q. Let me show you some photographs that we've
13 been given in disclosure here. I think I'll have these
14 marked here as -- oh, Lord -- 162, 161, 160, 159, and 158
15 or 158 through 162 for identification.

16 (Defendant's Exhibits 158 through 162
17 were marked for identification.)

18 BY MR. SEARS:

19 Q. Okay. Let me show you these. Are these
20 photographs that you took on one of your expeditions out
21 to these trails?

22 A. I know this area. I can't say I specifically
23 took these pictures but I know this area.

24 Q. If I told you that they were disclosed to us
25 with a photo log showing you were the photographer for

1 those, would that seem correct?

2 A. Yeah. I've never seen numbers or anything.

3 Q. So those are numbers related to the disclosure
4 that was made in this case?

5 A. Okay.

6 MR. SEARS: Let's -- I move 158 through 162.

7 MR. BUTNER: No objection.

8 THE COURT: 158 through 162 are admitted for
9 purposes of these hearings.

10 (Defendant's Exhibits 158 through 162
11 were admitted into evidence.)

12 BY MR. SEARS:

13 Q. Let's look at 158.

14 A. Okay.

15 Q. That's this area here at Boone Court. It's
16 shown here with a little cul-de-sac at the end that shows
17 the gravel road heading down towards Trail 309, correct?

18 A. That would be correct.

19 Q. And, in fact, on the forest service map it
20 says that this is the official trailhead for Trail 309?

21 A. I don't know.

22 Q. Did you ever look at the forest service -- do
23 you have the forest service map?

24 A. I have an old forest service map.

25 Q. Does it have Trail 309 on it?

1 A. That, I don't know. I'm not positive on that.

2 Q. Okay. On this map -- this is a blow up of a
3 forest service map. It shows Boone Court and a trailhead
4 here at Trail 309. This would be that area corresponding
5 to that area on the map, is that correct?

6 A. That's correct.

7 Q. And there is a sign here that says private
8 property --

9 A. Correct.

10 Q. -- right on the corner?

11 Did you see either in this photograph or when
12 you were out there anything that looked to you like an
13 organized trailhead, parking areas, or pit toilets?

14 A. Oh, no, sir.

15 Q. Anything?

16 A. No, sir.

17 Q. Just as you see it. Okay. And let's look at
18 159 in evidence. 159 is a dirt road. There's a house
19 here on the right -- and we'll look at some other
20 photographs but you and I have had this discussion more
21 than once. This area I believe is -- it's depicted in 159
22 is this piece off of Love Lane, there's a house there,
23 there's a house there, are we -- is this 159 a picture
24 there?

25 A. We've had discussions. Again, there's a

1 section that comes right here, that is where I believe it
2 is.

3 Q. But doesn't show any houses or houses shown on
4 this map?

5 A. Correct. This would be -- because when you
6 take this from Boone Court, which was the first picture
7 you were looking at --

8 Q. Uh-huh.

9 A. -- you make the left and go this way it would
10 connect to that row of houses. You don't make -- you
11 don't head to the north or to the east.

12 Q. In the early morning hours of July 3rd, 2008,
13 detectives at about 4:30 in the morning looking for the
14 place where Mr. DeMocker said he was riding his bike,
15 actually, to your understanding came down this dirt road
16 on 159?

17 A. I was there.

18 Q. You were there?

19 A. Yeah.

20 Q. And got down and couldn't find where this
21 trail that cuts across here might have been at 4:30 in the
22 morning, couldn't see; is that right?

23 A. That's correct.

24 Q. Let's look at -- this is 160 in evidence.
25 This is the area, whether you're right or I'm right, this

1 is area at the end of this lane that we were just looking
2 at in 159. This is -- this is gravel here. This
3 transformer. This well house building. These are all
4 depicted down here at the end of 159, correct?

5 A. Correct.

6 Q. And the trailhead -- actually, the trail that
7 you discovered later is the end of trail 309, is that
8 shown in this picture 160?

9 A. You can't make out the trail but I know that
10 it's in this section between this tree and this little
11 green thing, somewhere in here.

12 Q. This little green thing would be one of those
13 covers that you put over a pump or something like that.
14 Is that what that is to you?

15 A. I believe so, yes.

16 Q. So the trail is just a path that starts out
17 here and goes down into the forest in this (indicating)
18 general vicinity near this well house, correct?

19 A. I believe it would go from this general area
20 and heading this way (indicating).

21 Q. You're pointing to the transformer and you're
22 pointing up behind the trail -- up behind the tree
23 rather?

24 A. That's correct.

25 Q. Okay. And that's the beginning of the actual

1 trail but we're not up here. Boone Court's down here
2 someplace, correct?

3 A. It's approximately right here (indicating).

4 Q. Okay.

5 A. Right in that area. Further -- actually, right
6 there (indicating).

7 Q. And the first part of that, if we look at 161,
8 161 is standing at the intersection of this little path
9 that we looked at or this little -- what this roadway is
10 here in 159. This picture 161 is standing at the area
11 here by the trailhead and looking back towards Boone
12 Court, right?

13 A. I don't believe that's correct.

14 Q. Looking up -- looking up the hill that way?

15 A. No, I don't believe that's correct.

16 Q. Where is this?

17 A. This is a section of Love Lane approximately
18 where it dead-ends. I would say it is approximately right
19 here, looking up the hill right here (indicating).

20 Q. Okay. Because you went out to the end of Love
21 Lane, and just couldn't find -- you couldn't find any
22 trail up at the end of Love Lane where it just kind of
23 peters out with these real estate signs, correct?

24 A. I wasn't able to look-- on the morning of the
25 3rd I thought that was possibly the start of the trail at

1 the end of the dirt road.

2 MR. SEARS: I'm done with the map, Your Honor.

3 THE COURT: Thank you.

4 MR. SEARS: It was nice to visit with you.

5 THE COURT: You're welcome.

6 BY MR. SEARS:

7 Q. What kind of mountain bike were you riding on
8 May 29th, 2009?

9 A. A Trek. I think it's a 930.

10 Q. And were you wearing biking shoes or some
11 other footwear?

12 A. Hiking-type style shoes.

13 Q. So you weren't wearing the kind of biking
14 shoes that Mr. DeMocker told you he was wearing the night
15 in question; is that right?

16 A. No, sir. I don't have a flip style.

17 Q. So when you were walking, you were walking
18 with hiking-type shoes, pushing the bike back; is that
19 right?

20 A. That's correct.

21 Q. And on that May 29th, 2009, return trip, did
22 you stop and pretend to pump up your tire periodically as
23 Mr. DeMocker told you he did?

24 A. I -- on the 29th I took photographs of all of
25 the intersections. I stopped to take photographs. So I

1 did get the photos -- camera out and everything.

2 Q. So your total round trip to a point where
3 you're not sure whether that was where Mr. DeMocker went
4 or not, but your total round trip was about two hours and
5 thirty-five minutes, including walking it back; is that
6 right?

7 A. That's correct.

8 Q. And looking at the part of the map up there in
9 the upper right hand corner, when you get off of the Love
10 Lane Trail, and you get -- you can -- within a few hundred
11 yards you get back on pavement, is that right, on Love
12 Lane as you're heading towards Williamson Valley Road, you
13 go around the corner and you're --

14 A. I'm not sure -- if you can reask that
15 question, please.

16 Q. Rainmaker is now a paved road, correct?

17 A. That's correct.

18 Q. Levie Lane is a paved road; is that right?

19 A. On the section that I was, that's correct.

20 Q. Yes. And the unnamed road that goes across to
21 Boone Court that you road on is a paved road until it gets
22 to the cul-de-sac at the end of Boone Court, correct?

23 A. Oh, the street that I didn't know the name of
24 is paved, correct.

25 Q. Yes. And you told me that you -- that for all

1 you know Mr. DeMocker had actually taken a different route
2 to go over and catch the Love Lane Trail, correct? He
3 didn't -- you assumed that he went across Boone Court but
4 you don't know that for a fact; is that right?

5 A. That's correct.

6 Q. And if he had gone a bit further past the
7 unnamed road that goes to Boone Court and headed down
8 towards Williamson Valley, those roads are paved, correct?

9 A. That is correct.

10 Q. And then if you had taken another road across
11 and come back up Love Lane, much of Love Lane coming back
12 is paved until just before you get to that spur off to the
13 left as you're going up the hill, correct?

14 A. Yes. Somewhere prior to the spur, it's paved.

15 Q. And so you can't tell us because you didn't
16 reconstruct it how long it would have taken to ride that
17 extra piece. By extra piece, I mean, that additional
18 paved road ride at the beginning and the end of your
19 reconstruction if -- Mr. DeMocker could have ridden longer
20 on pavement both going out and coming back then you did,
21 correct?

22 A. My times are for the trail I did. If he did
23 anything outside of that, I can't give you those times.

24 Q. Correct. And you don't -- what I'm saying is
25 when you recreated that route, you couldn't have been

1 certain precisely how Mr. DeMocker got onto the Love Lane
2 Trial, correct?

3 A. No. I just -- I don't know exactly how he got
4 to Love Lane Trial. I just took the most direct route.

5 Q. So if Mr. DeMocker had taken a less direct
6 route, it would have presumably taken longer at either end
7 of his ride, beginning at the ride and at the end of the
8 right, correct?

9 A. If he took a longer route, it would have taken
10 longer.

11 Q. Yes. And coming back at the end if
12 Mr. DeMocker had not turned and gone up through Boone
13 Court that way, if he had, for example, proceeded down
14 Love Lane towards Williamson Valley Road and then turned
15 around and ridden back, that's a very steep hill coming
16 back up to Rainmaker, if you start down at the bottom of
17 Williamson Valley Road, isn't it?

18 A. You're asking me a couple of questions there.
19 So --

20 Q. Okay. Let's assume for purposes of these next
21 couple of questions that Mr. DeMocker did not take that
22 direct route from Rainmaker across on the unnamed road to
23 Boone Court. Okay. Let's assume that he went past that
24 turn and went further on Rainmaker heading down and then
25 turned and came back up.

1 A. Are we assuming this on his route out?

2 Q. Both ways. That he more or less followed the
3 same route out and back.

4 A. Okay. If you want to assume that. Okay.

5 Q. Let's just assume that. If he did that, then
6 when he was coming back he would be riding more pavement
7 than you rode, correct, he would be riding a longer route?

8 A. If he did that, that would be correct.

9 Q. And that pavement ride in large part coming
10 back, in making these assumptions, would have been up
11 steep hills, correct?

12 A. A section of it would be the same steep hill
13 that I would climb and then another section of steep hill
14 below that, yes.

15 Q. Mr. DeMocker wasn't sure how long his trip
16 lasted but he told you that he thought it might be around
17 three hours, correct?

18 A. It was approximate around three, three and a
19 half hours.

20 Q. And you're at two thirty-five riding a route
21 that you've described so carefully, right?

22 A. It was two hours and thirty-five minutes,
23 correct.

24 Q. And if Mr. DeMocker rode a bit longer at the
25 beginning and the end, it might have taken him three

1 hours, correct?

2 A. That's correct.

3 Q. And how old were you on May 29th of this year?

4 A. How old was I?

5 Q. Yes, sir.

6 A. This year -- I believe 36.

7 Q. How old was Mr. DeMocker in July of 2008?

8 A. I believe he was 52 but I may be wrong on that
9 one.

10 Q. Okay. He's older than you, correct?

11 A. Yes, sir.

12 Q. Okay. And did you make any effort to try and
13 find someone, if it wasn't you, that would approximate
14 Mr. DeMocker's biking abilities?

15 A. His biking abilities?

16 Q. Yes, sir.

17 A. Just from what the information shared with me
18 I probably have similar biking abilities.

19 Q. What makes you say that?

20 A. He mentioned that he had not biked all that
21 much and he just started getting back into it, that he's a
22 runner, and it's similar to what I am.

23 Q. Okay. And tell me about your Trek 930 as
24 compared to Mr. DeMocker's bike. Would you say they are
25 comparable bikes?

1 A. I believe they're both -- have the front
2 suspension. I'm not sure price range or anything like
3 that, but they're mountain bikes.

4 Q. How much does your bike weigh?

5 A. I don't know, sir.

6 Q. How much does Mr. DeMocker's bike weigh?

7 A. I personally don't know.

8 Q. What kind of tires did you have on your bike?

9 A. I have a mountain bike-style tire, tread tire.

10 Q. Did you flatten the rear tire on your bike
11 when you walked it back?

12 A. No.

13 Q. What time of day was it on May 29th that you
14 did this run?

15 A. I can check. I don't recall the exact time.

16 Q. Before 6:30 in the evening when you started?

17 A. Yes, sir.

18 Q. How many people did you run into?

19 A. I don't know. With the recording you can
20 possibly tell, people that I said hi to or whatever that
21 passed, whatever. I don't recall.

22 Q. Going back to the hike that you took on July
23 13th, 2008, did you run into people on that hike?

24 A. Yes, I did.

25 Q. What time of the day was that?

1 A. Sometime early morning. It was a Sunday, I
2 think.

3 Q. It was a weekend?

4 A. Correct.

5 Q. Mr. DeMocker said that he was riding his bike
6 in the evening on a Wednesday, correct?

7 A. That's correct.

8 Q. And Mr. DeMocker told you that he didn't run
9 into any people that he remembered on his ride, correct?

10 A. He said he didn't run into any people.

11 Q. Is that surprising to you? Is that surprising
12 to you?

13 A. In my opinion, yes, I think it's surprising.

14 Q. That somebody would be riding on a week night
15 in the evening, towards sunset, and they didn't run into
16 any people, that's a surprising circumstance to you?

17 A. Yes, sir.

18 Q. Okay. Have you done any experiments at all to
19 determine the level of foot or horse or bicycle traffic on
20 week nights in July on that trail beginning at 6:30 in the
21 evening?

22 A. I just spoke with a neighbor who lived right
23 there.

24 Q. You haven't conducted any experiments?

25 A. Experiments?

1 Q. Yes. To go -- to just wander, run out and see
2 if you run into people?

3 A. No.

4 Q. Okay. Now, when you went on July 13th that
5 would have been a little more than 10 days after the
6 murder of Carol Kennedy. Did you look on any portion of
7 the trail that you were hiking on that corresponded with
8 what Mr. DeMocker told you about where he was looking for
9 bicycle tracks?

10 A. I saw bicycle tracks.

11 Q. Did you make any effort to photograph or
12 inspect them?

13 A. No, I did not.

14 Q. Did you have any picture, other information,
15 with you that would have given you some basis for
16 comparison pictures of the tracks off Glenshandra or the
17 tracks made by Mr. DeMocker's bike tire so that you could
18 look on the ground and see if there were similar tracks?

19 A. I did not bring any pictures with me.

20 Q. How many different bicycle tracks did you see
21 on your July 13th hike on 309 and 347?

22 A. I can't answer that.

23 Q. They were tracks everywhere?

24 A. There were tracks on the trail I was on, yes.

25 Q. So was there any effort made by law

1 enforcement between 4:30 in the morning on July 3rd, 2008,
2 and the time that you went back on July 13th to go back
3 out to this area looking for bicycle tracks that would
4 corroborate Mr. DeMocker's alibi?

5 A. On the 3rd -- morning of the 3rd I went out to
6 the look for tracks.

7 Q. At what time?

8 A. At 4:30 in the morning.

9 Q. And you never got to the trail, correct? You
10 couldn't find the trail?

11 A. I thought I found the trail on that morning.

12 Q. At 4:30 in the morning?

13 A. Yes, sir.

14 Q. What part of the trail did you think you
15 found?

16 A. The end of Love Lane. The dirt road. I
17 believed that was the trail at the time.

18 Q. But it wasn't, was it?

19 A. No, it was not.

20 Q. Okay. So tell me again what efforts were made
21 after that false start between July 3rd and July 13th to
22 go out and see if tracks could be found that would be
23 associated with Mr. DeMocker's bicycle where he said he
24 was riding?

25 A. On the morning of the 3rd I looked for the

1 tracks. I didn't find any and I made no efforts after
2 that time.

3 Q. No one from law enforcement at your direction
4 or otherwise went back in that 10 day period to see if
5 they could find the tracks with a map or somebody that
6 knew the area?

7 A. That's correct.

8 Q. And, yet, when you went back on the 13th there
9 were bicycle tracks all around you?

10 A. There were bicycle riders around me also.

11 Q. Did you see tracks that were there that
12 weren't being made by the riders that you saw, tracks that
13 were older?

14 A. There were tracks in the trail I was riding
15 on. I couldn't estimate in age.

16 Q. Well, you pointed out that there were people
17 -- other people other than you riding their bikes in
18 there, right?

19 A. Correct.

20 Q. Do you think that every track that you saw on
21 the ground was made by those people that day that you saw?

22 A. Could have been any time within that 10 days.

23 Q. And, still, no effort was made by you as the
24 case agent or any one else to go back and see if any of
25 those bicycle tracks on this trail could be associated to

1 Mr. DeMocker's bicycle, is that what you're saying?

2 A. That's correct, sir. I did not.

3 MR. SEARS: No further questions.

4 THE COURT: Rebut.

5 MR. BUTNER: I don't have any questions of
6 this witness. Thank you.

7 THE COURT: Do you wish to excuse Detective
8 Brown at this time?

9 MR. BUTNER: Sure.

10 MR. SEARS: Your Honor, I'm sorry, I
11 overlooked one question on cross. If I might reopen
12 subject to redirect my Mr. Butler.

13 THE COURT: You may.

14

15 CROSS-EXAMINATION (RE-OPENED)

16 BY MR. SEARS:

17 Q. We have a number of pictures here in the
18 disclosure, Deputy, of GPS readings that you did and the
19 audiotape talks about this. Is that data from the GPS
20 work that you did preserved in your GPS unit?

21 A. In my GPS unit?

22 Q. Yes.

23 A. No. It was downloaded.

24 Q. Where is it downloaded?

25 A. All of that information has been submitted

1 into evidence.

2 Q. Is it on a CD or are we just talking -- what
3 we have are printouts. Some data dumps form the GPS unit.
4 Are you saying that there is a thumb drive or CD or
5 something that actually contains the data out of your
6 unit?

7 A. The information was downloaded through MIS. I
8 can't recall if it was saved on a disk or not. I can
9 look. I just don't recall right now.

10 Q. But if it's not -- if it's not in evidence,
11 then it doesn't exists some someplace else's, is that what
12 you're saying?

13 A. It wouldn't be saved on any GPS or anything,
14 that's correct.

15 MR. SEARS: Thank you. I have no other
16 questions. Thank you for letting me reopen.

17 THE COURT: Mr. Butner.

18 MR. BUTNER: I don't have any further
19 questions of this witness, Judge.

20 THE COURT: Any objection to excusing
21 Mr. Brown?

22 MR. SEARS: No, Your Honor.

23 MR. BUTNER: No objection.

24 THE COURT: You're excused, Detective Brown.
25 Thank you. Mr. Butner.

1 MR. BUTNER: I'd called Detective Sergeant
2 Huante to the stand.

3
4 LUIS HUANTE,
5 called as a witness, having been sworn, testified as
6 follows:

7

8 DIRECT EXAMINATION

9 BY MR. BUTNER:

10 Q. Would you please state your name for the
11 record.

12 A. Sergeant Luis Huante.

13 Q. What's your occupation, sir?

14 A. I'm a Sergeant with the sheriff's office.

15 Q. And how long have you been so employed?

16 A. Seventeen years.

17 Q. And were you a Sergeant with the sheriff's
18 office back in July of 2008?

19 A. Yes, sir. I was assigned to the criminal
20 investigation section. I was a Detective Sergeant at the
21 time.

22 Q. And you were involved in the investigation of
23 the DeMocker case; is that correct?

24 A. Yes, I was.

25 Q. At some point in time did you attempt to

1 retrace the route of travel that Mr. DeMocker described
2 for himself on the evening of the homicide of Carol
3 Kennedy?

4 A. Yes, and based on the information that I
5 received, I believe, from his girlfriend.

6 Q. When did you attempt to retrace this route?

7 A. It was on July 19th at about 5:14 in the
8 afternoon.

9 Q. And you say you -- based upon information that
10 you got from his girlfriend, and who would that be?

11 A. I believe her name is Rene Gerard.

12 Q. And when did you meet with Miss Gerard to get
13 this information?

14 A. Detective Brown and I met with her down at the
15 Granite Basin Trailhead Park or Trailhead.

16 Q. Okay. And what date was that?

17 A. I believe that was on the 15th of July.

18 Q. And would you describe basically what took
19 place when you met with her on July 15th of 2008 -- right?

20 A. Yes. Detective Brown had an appointment with
21 her. We met with her out there on the Granite Basin Road
22 by the turn-off to the shooting range. She then drove her
23 vehicle to the Cayuse Trailhead area and we walked the
24 area.

25 During that time while we were walking she

1 took a phone call from, I believe, it was Mr. DeMocker. I
2 heard Mr. DeMocker's voice on the other end asking her why
3 weren't asking him where he was riding.

4 Q. Okay. Now, you didn't get on the phone and
5 speak directly with him, did you?

6 A. No, but I spoke in a loud voice enough that I
7 hoped he could hear me, that I basically said I can't
8 speak to him.

9 Q. So any way, did Miss Gerard take you to the
10 area that Mr. DeMocker had shown her as the route that he
11 traveled?

12 A. Yes.

13 Q. Where did she take you?

14 A. To the Cayuse Trailhead. I believe the trail
15 number is 346.

16 Q. Okay. And what did she indicate was the route
17 traveled by Mr. DeMocker?

18 A. That this is where they started their hike
19 back towards the Love Lane Trailhead. Where Mr. DeMocker
20 started his ride.

21 Q. Okay. And did she tell you when she did this
22 hike with Mr. DeMocker?

23 A. I'm not exactly sure but she said it was
24 within the last two weeks.

25 Q. Okay. Within the preceding two weeks?

1 A. Yes.

2 Q. And where did she indicate you should gone?

3 A. Based on what she described to me she
4 described a house with dogs that were barking at the other
5 end on Love Lane. I had been there already so I knew what
6 she was describing, which was the end of Boone Court, and
7 I believe the other name of the street is Shauna.

8 Q. How do you spell Shauna?

9 A. S-h-u-a-n-a (sic), I believe.

10 Q. Okay. And that's down there near the end of
11 Boone Court?

12 A. Yes.

13 Q. In fact, did you happen to see any of the
14 photographs that were being displayed to Detective Brown?

15 A. No.

16 Q. I'm just going to hand you these photographs.
17 I think they are 158 through 162 and if you would take a
18 look at those and see if you see a photograph of the area
19 back towards Love Lane that was described to you by Rene
20 Gerard.

21 A. In this photo here it depicts a house where
22 the dogs and the trailhead begins.

23 Q. Okay.

24 A. This is at the end of Love Lane or part of
25 Love Lane, I should say.

1 Q. This blue gray house on the right hand side of
2 the photograph?

3 A. On the other side of the house is where the
4 trailhead starts.

5 Q. And I'm holding up -- this is photograph
6 Number 159, correct, Exhibit 159, I should say.

7 A. Yes.

8 Q. Okay. And is there a marked trail in that
9 area?

10 A. I did not see anything that marked that part
11 as a trailhead. It's just almost like -- I would call it
12 a cow trail, cow path.

13 Q. Okay. This cow path, does it appear to you to
14 be on private property there?

15 A. Yes. Due to the fact that there is a
16 pumphouse south of the trail, the trail is between the
17 house and the pumphouse.

18 Q. Are there any markings for the trail?

19 A. No.

20 Q. Okay. So you got this information about where
21 the -- where the start of the ride was from Miss Gerard
22 down by Love Lane?

23 A. And also Mr. DeMocker -- well, during our
24 interview.

25 Q. Right. And then you got the information from

1 Miss Gerard when she was on the phone she showed you where
2 the end of the ride was?

3 A. Yes.

4 Q. And that was -- where was end of the ride?

5 A. At the end of Trail 346 on the Cayuse picnic
6 area.

7 Q. Now, at this end of Trail 346 and the Cayuse,
8 as you put it the picnic area, did you have discussion
9 about where Mr. DeMocker had turned around?

10 A. She could not give us a direct or an exact
11 location where he turned around.

12 Q. Did she tell you she had hiked it with
13 Mr. DeMocker?

14 A. Yes.

15 Q. But she wasn't precise on where this turn
16 around occurred?

17 A. She could only tell us that Mr. DeMocker had
18 flagged a bush somewhere down the trail.

19 Q. Okay. And when she said somewhere down the
20 trail, was this Trail 346 or --

21 A. We were at the beginning of 346.

22 Q. So your understanding was that the bush was
23 someplace down 346?

24 A. Or 47.

25 Q. Okay. So did you attempt to go back out onto

1 those trials on the occasion where you met Rene Gerard
2 there, I think that was on July 15th of 2008?

3 A. No, I did not, but Detective Brown did.

4 Q. When did you go back?

5 A. On the 19th.

6 Q. Of July 2008, right?

7 A. Correct.

8 Q. And what did you do on July 19th of 2008?

9 A. I parked on top of Boone Court and Shauna and
10 drove my bicycle -- rode my bike down to the trailhead.
11 All the way down to the Cayuse day use area.

12 Q. Now, you said that you parked at Boone Court
13 and Shauna, and we've been looking at this map over here
14 to your left, and can you tell on the map where the area
15 is where you parked?

16 A. It would be right here (indicating).

17 Q. And you're pointing to an area right by where
18 it's labeled Boone Court?

19 A. Yes. Almost by the U. It's is a cul-de-sac
20 on both ends. Boone Court is cul-de-sac on both ends and
21 this street here (indicating) would be Shauna.

22 Q. Okay. So you parked your car there?

23 A. Yes.

24 Q. And then what did you do?

25 A. I rode the trials. I started at 309, which is

1 the cow path, which was very rocky. I had difficulty
2 riding my bike. At some points I even had to carry my
3 bike.

4 Q. Okay. And then where did you go from 309?

5 A. I ended up on, I believe, it was 347 and then
6 I rode that trail to Trail Number 346, down to the Cayuse
7 area.

8 Q. And were you recording this riding of the
9 trial, so to speak?

10 A. Yes, I did. I videotaped it.

11 Q. And how did you videotape it?

12 A. I have a small mounted camera that goes on my
13 handlebars.

14 Q. And while you were riding along these trails
15 and so forth, did you turn it off at any point in time?

16 A. No.

17 Q. So you kept it going?

18 A. Yes.

19 Q. And is there audio for this video or for this
20 camera?

21 A. Yes.

22 Q. And what did you do in regards to the audio?

23 A. I would make notations of the trailhead
24 numbers and the trailhead junctions and approximate times.

25 Q. When you say approximate times, what do you

1 mean, the time of day, or how long you've been there, or
2 both or what?

3 A. Both.

4 Q. So give us an example of what you would do?

5 A. I would say I'm at the junction of 347, time
6 -- the time, and then how long it took me to get there.

7 Q. And how were you able to ascertain the time it
8 was and the time that you got there?

9 A. I have a speedometer on my bicycle that gives
10 me time, date, mileage, distance traveled.

11 Q. And is that what you were using for your
12 reference?

13 A. Yes.

14 Q. And did you bring that recording with you
15 today?

16 A. Yes, I did.

17 Q. Do you have it with you up there?

18 A. Yes, I do.

19 Q. How do you play this recording? Do you know?

20 A. It's a CD. It's a video CD that can be played
21 through Windows Media player.

22 Q. How long is the recording approximately in
23 time?

24 A. It's probably about 50 minutes.

25 Q. Five-0?

1 A. Yes.

2 Q. Can you fast forward it, so to speak?

3 A. You probably could, yes.

4 MR. BUTNER: Judge, I would like to play this
5 for the Court. We don't have one marked to put into
6 evidence at this time. Although, I guess, we could do
7 that. Can we use yours, Mr. Sears?

8 MR. SEARS: Yep.

9 MR. BUTNER: I think we can move the computer
10 -- how we've done it in the past -- up to the witness
11 stand.

12 THE COURT: Mr. Sears, assuming that you don't
13 want to lose your tape and have it admitted, do you just
14 want to play it or do you want to have it admitted into
15 evidence at this point?

16 MR. SEARS: I wouldn't mind having it
17 admitted. We've got other copies of it. It's evidence
18 Item 28 from the sheriff's office, Judge, for the record.

19 THE COURT: Let's have it marked, I think
20 we're up to 163.

21 THE CLERK: He wants me to use that one?

22 THE COURT: Yes.

23 (State's Exhibit 163 was marked for identification.)

24 BY MR. BUTNER:

25 Q. Is this -- just to clarify is this Evidence

1 Item Number 28 from the sheriff's office?

2 A. Yes, sir.

3 Q. Okay.

4 THE COURT: 163 is admitted for purposes of
5 this hearing.

6 MR. BUTNER: Thanks, Judge.

7 THE COURT: Without objection.

8 (State's Exhibit 163 was admitted
9 into evidence.)

10 THE COURT: Is it your intention to play the
11 whole --

12 MR. BUTNER: Judge, I think what we'll do is
13 just play part of it and skip along, so to speak, to hit
14 the high points.

15 THE COURT: Any commentary I'll direct the
16 Court Reporter need not report. If there is audio
17 commentary on the exhibit, the exhibit is in evidence,
18 speaks for itself, but if people are speaking during the
19 playing of it, then you can report that.

20 THE COURT REPORTER: (Nods.)

21 THE WITNESS: This is not playing.

22 MR. BUTNER: Best made plans or lack of plans.

23 THE WITNESS: I don't think this is --

24 THE COURT: Does it play on your computer?

25 MR. SEARS: (Nods.)

1 MR. BUTNER: We can try the sheriff's
2 evidence.

3 MS. COWELL: You might try Windows Media
4 Player.

5 THE WITNESS: I did already. It won't play.

6 MS. COWELL: That's what I would have done.

7 THE COURT: The rule of Court is test your
8 stuff and make sure that it plays when we're in the trial.

9 MR. BUTNER: Oh, I know. Well, let's try the
10 one that you have. Let's try the sheriff's evidence one,
11 Judge. Mr. Sears, would you have any objection to us
12 trying the sheriff's evidence one --

13 MR. SEARS: Sure.

14 MR. BUTNER: -- but not putting it into
15 evidence?

16 MR. SEARS: That's fine.

17 MR. BUTNER: Let's give that a shot and see if
18 it might work.

19 MR. SEARS: Some generation copy.

20 MR. BUTNER: Right.

21 THE COURT: Thank you.

22 MR. BUTNER: Thank you.

23 (The videotape is playing.)

24 MR. BUTNER: All right.

25 Q. Okay. We're playing it right now; is that

1 correct?

2 A. Yes. I'm at the corner of Shauna and Boone
3 Court.

4 Q. Okay. We don't have audio though, right?

5 MS. COWELL: The speakers are on. It will be
6 low. I can bring the other one up if you would like me
7 too.

8 THE COURT: You can show that is Mr. Butner's
9 paralegal.

10 THE WITNESS: The audio is not there.

11 (The videotape is playing.)

12 THE WITNESS: This is going towards the house.
13 This house.

14 BY MR. BUTNER:

15 Q. The house by the trails --

16 A. Yes.

17 Q. -- depicted in Photograph Number 159; is that
18 correct?

19 A. Yes.

20 MR. SEARS: Apparently during an earthquake.

21 THE COURT: That will be the result of riding,
22 I'm sure.

23 THE WITNESS: There's the pumphouse I was
24 talking about. There's the cow path I was talking about
25 right there. I did my best to ride here. It was very

1 difficult.

2 BY MR. BUTNER:

3 Q. Did you fall at any point in time while you
4 were riding?

5 A. No. I've fallen before. At the end of this
6 cow path there's a dry wash that you have to go down and
7 go back up. At that point I met four horse riders and
8 their horses. This -- at this point I had to carry my
9 bicycle.

10 Q. Now you're on what trail number while it's
11 going along right now?

12 A. This is 309.

13 Q. Okay.

14 A. This is the wash I was mentioning.

15 Q. And are you riding again?

16 A. No. I'm walking my bike.

17 Q. Now, you stopped for a moment here?

18 A. Here comes the horse riders.

19 Q. Ah.

20 A. The path is too narrow. We could not fit on
21 the same trail at the same time.

22 Q. Now are you riding your bike or still walking?

23 A. I'm still walking my bike. I attempted to
24 ride my bike at this point but it just became really rocky
25 again.

1 Q. Now are you still on Trail 309?

2 A. Yes.

3 Q. Are you riding at this point?

4 A. I'm attempting to ride but it was steep and
5 very rocky. Now I'm bike riding.

6 Q. Is this a narrow trail as depicted in the
7 video, approximately, how wide is it?

8 A. Maybe two feet at the most in some areas. This
9 portion of the trail I was able to ride. I'm still on
10 309.

11 Q. Approximately how much time did you spend on
12 Trail 309?

13 A. If I could look at my notes real quick, my
14 report.

15 Q. Okay. And what report number is that?

16 A. I don't know the number but it's a
17 supplemental to report -- states Boone Court to Cayuse
18 bike ride.

19 Q. Okay.

20 A. 96.

21 Q. Okay. You're refreshing your recollection
22 now; is that correct?

23 A. Yes.

24 Q. Okay.

25 A. It took me about 11 minutes to get to the

1 actual trail marker that said 309.

2 Q. Have we gone by that yet?

3 A. No.

4 Q. If you fast forward this will it show the
5 entire trail but at an accelerated rate?

6 A. Yes.

7 Q. Why don't we do that.

8 A. (Witness complies.)

9 Q. Now, we just gone by some sort of a gate or
10 something there; is that right?

11 A. Yes. I believe this is where the marker was
12 for the trailhead that said 309.

13 Q. By the gate?

14 A. Somewhere near the gate. Most of 309 was very
15 rough.

16 Q. It's broadened out at this point in time; is
17 that correct?

18 A. Yes. I believe I'm now at -- pretty close to
19 the intersection of 309 and 347.

20 Q. And approximately how wide is the trail at
21 this area?

22 A. In some areas it's up to five feet maybe six
23 feet.

24 Q. Okay.

25 A. It's fairly wide in some areas and some other

1 locations it shrinks down to maybe four.

2 Q. Now, you stopped here; is that correct?

3 A. Yes.

4 Q. For what purpose?

5 A. I believe I was trying to figure out which
6 direction I needed to go. I was looking at my map -- I'm
7 sorry. This is when I stopped to show the Granite Basin
8 Mountain in the back -- in the background. You see
9 Granite Basin Mountain.

10 Q. Did you mean Granite Mountain?

11 A. Yes.

12 Q. And are you headed towards Granite Mountain?

13 A. Yes.

14 Q. Are you are on 309 now or are you on a
15 different trail?

16 A. I believe I'm on 347.

17 Q. Okay. And how long did you ride on 347?

18 A. Approximately maybe 48 minutes.

19 Q. And did you make any stops while you were
20 riding along?

21 A. Yes, I did.

22 Q. How many?

23 A. At every junction that I found the trail
24 marker. I just wanted to make sure that I was going on
25 the ride path towards the Cayuse Trail.

1 Q. Uh-huh.

2 A. This had been the first time that I had ridden
3 this trail.

4 Q. And what was the general incline of this
5 trail, and we're talking about 347 now, was it up or down
6 or both or what?

7 A. Most of it was in a downward grade towards --
8 I'm sorry, uphill grade towards Granite Basin based on the
9 fact that when I returned back I didn't have to pedal as
10 much as I did going there. There's the mountain in the
11 back.

12 Q. From your point of view did anything of
13 significance occur or did you observe anything of
14 significance between this point and the video and when you
15 arrived at the intersection with Trail 346?

16 A. No. Just the fact that there were several
17 gates that I had to cross.

18 Q. Were they open?

19 A. No. They were closed.

20 Q. So then you would have to get off your bike
21 and open them?

22 A. Yes.

23 Q. Did you close them once you went through?

24 A. Yes.

25 Q. What kind of shoes were you wearing when you

1 were doing this?

2 A. Some tenney shoes.

3 Q. And your age, sir, as of the date of this
4 video?

5 A. I was 43.

6 Q. And your height and wait?

7 A. I was 5'9" 220.

8 Q. You're level of mountain bike riding skill,
9 how would you describe that?

10 A. I've been riding for approximately three years
11 now. I have ridden approximately 2800 miles on my
12 bicycle.

13 Q. Have you ever competed in any races or
14 contests?

15 A. No. I've had -- I do the fundraiser for the
16 Special Olympics and I ride from Skull Valley to Yarnell
17 once a year.

18 Q. How often did you -- as of the date of this,
19 this would be back in July of 2008, how often were you
20 riding your mountain bike as of that time?

21 A. I would say almost every weekend.

22 Q. On the weekends only?

23 A. Yes.

24 Q. Can you fast forward to where we get to the
25 intersection with Trail 346?

1 A. (Witness complies.)

2 Q. Is that what you're doing now?

3 A. Yes.

4 MR. SEARS: A-ha. I think so.

5 MR. BUTNER: I noted an a-ha from the gallery.

6 Was that --

7 MR. SEARS: That was from me there.

8 THE WITNESS: There was some sort of --

9 MR. SEARS: Mr. Butner, can you have him back
10 that up just a minute.

11 MR. BUTNER: Sure. Back up.

12 THE WITNESS; (Complies.)

13 BY MR. BUTNER:

14 Q. And we're backing up towards what, Detective
15 Huante?

16 A. There was -- I would call it a cow tank,
17 where it's raised, the embankments, and they will collect
18 water so the cows can go and drink water and it's kind of,
19 I guess, fenced in.

20 Q. Okay. Fenced in by what kind of a fence?

21 A. Barb wire and just sticks, I guess, you could
22 call it a ranch -- rancher's fence.

23 Q. Vertical sticks, so to speak, woven in amongst
24 strands of barb wire?

25 A. Right.

1 Q. And do you know -- would you be able to point
2 at a map of the trail as to approximately where that
3 location was?

4 A. I would be guessing.

5 Q. Okay.

6 A. It's somewhere in here (indicating).

7 Q. Now, are -- in regard to the video that we're
8 watching right now, are we approaching Trail 346?

9 A. We're getting there, yes.

10 MR. SEARS: Could we stop it and go back just
11 a bit?

12 THE WITNESS: (Complies.)

13 MR. SEARS: Mr. Butner, that's fine. Right in
14 there. That would be good. We don't need to go back.
15 Thank you.

16 BY MR. BUTNER:

17 Q. We're looking at -- did you recognize that
18 particular area, Detective Huante?

19 A. I didn't see it again. I saw the fencing but
20 I didn't see that particular area again.

21 Q. Will you let us know when we're at the
22 intersection with Trail 346?

23 A. Yes.

24 Q. While you were riding on Trail 347, were there
25 any areas where you had to get off your bike and carry it?

1 A. No. No. There was some boulders but I was
2 able to go over them. I believe these are the boulders I
3 was describing.

4 Q. These were the boulders you were just
5 discussing, did you say?

6 A. Yes.

7 Q. And what type of day were you conducting this
8 ride?

9 A. I started my ride at 4 -- I'm sorry, 5:14 p.m.
10 I believe I'm about to reach 346. There should be a gate
11 here coming up.

12 Q. Does the trail narrow considerably as it
13 approaches the intersection with 346?

14 A. Somewhat, yes. It's on the side of the
15 mountain. There's the gate.

16 Q. And is this where 347 intersects 346?

17 A. Just down the road here a little bit. I
18 actually stop and I look at the makers to insure that I
19 was going on 346. There's the trailhead marker right
20 there (indicating). I was looking at it.

21 Q. Fast forward if you will, please.

22 A. (Complies.)

23 I think it might show the marker here in a few
24 minutes.

25 Q. Okay. Yeah. It's obscured by the lighting,

1 so to speak.

2 A. Yes.

3 Q. You can't see it.

4 A. There it is.

5 Q. Okay. It was a vertical marker; is that
6 correct?

7 A. Yes. Yes. And this is the one that takes us
8 to Cayuse. There's another gate. This is the area that
9 -- a little bit further where Miss Gerard took us to.

10 Q. Okay. Did your video to that area?

11 A. I videotaped all the way towards the day use
12 area, the picnic area, and showed the information board
13 for the picnic area. This area again was very rocky.

14 Q. How long were you riding on 346?

15 A. If I could look at my report real quick.

16 Q. Please do.

17 A. It took me a total of 47 minutes and 17
18 seconds and it was a total of 3.5 miles.

19 Q. On trail 346?

20 A. No. The length, total length, of the entire
21 trail that I rode.

22 Q. Okay. So that included from 309 onto 367 and
23 then onto 346?

24 A. Yes.

25 THE COURT: And the amount of distance was?

1 THE WITNESS: 3.5 miles.

2 THE COURT: Thank you.

3 THE WITNESS: This is the picnic day use area
4 for Cayuse. There is -- there is a bulletin board.
5 Should be coming up here -- there.

6 BY MR. BUTNER:

7 Q. Okay. And then you -- go ahead.

8 A. I stopped my video due to the fact that the
9 battery power was kind of low and the only section that I
10 recorded on my return was when I arrived at my vehicle and
11 I noted time, the distance that it took me to get there.

12 Q. What was the time and distance when you
13 returned to your vehicle?

14 A. When I returned to my vehicle it was 7.2 total
15 miles and it took me about an hour and forty-three
16 minutes.

17 Q. And that's round trip?

18 A. Yes.

19 Q. You made a little handwritten note on your own
20 report there, too, was that the math, so to speak?

21 A. Yes.

22 Q. So you added the trail from Love Lane to
23 Cayuse Trailhead and then you added it back?

24 A. Yes.

25 Q. Did you ride back?

1 A. Yes.

2 Q. So you rode all the way back and you didn't
3 stop and walk at anyplace along the way?

4 A. No.

5 MR. BUTNER: And when we have a copy, Judge,
6 I'll move for it's admission for the purpose of this
7 hearing.

8 MR. SEARS: No objection.

9 THE COURT: 163 will be admitted for purposes
10 of this hearing.

11 MR. BUTNER: I don't have any further
12 questions of this witness at this time.

13 THE COURT: Do you want to try to finish up
14 Mr. Huante?

15 MR. SEARS: Your Honor, I have a 12:30
16 appointment that I need to keep.

17 THE COURT: We'll take a break then and
18 recess. Mr. Huante, you can be back with us, please, at
19 1:30.

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: We'll stand in recess.

22 (Whereupon the noon recess was taken.)
23
24
25

January 13, 2010
1:34 P.M.

Hearing on Motions (Cont'd)

THE COURT: This is continuing in State versus DeMocker, and Detective Sergeant Huante is still on the stand and we were about to commence, I think, some additional examination by Mr. Sears.

Mr. Sears, I had what you had given me was marked as 163 and I went ahead and admitted that but I think we need to substitute, as Mr. Butner suggested, some other exhibit because it looks like there are things on there other than what they played for me.

MR. SEARS: We also weren't able to open my exhibit and make it run on Sergeant Huante's computer either. I don't have a problem with that if the State doesn't.

THE COURT: I don't -- it has some additional videography that is not what we saw and you probably don't want to have the confusion in the record about that.

MR. SEARS: Thank you.

MR. BUTNER: We do have an extra copy, Judge, that Detective Huante was kind enough to make over the break.

THE COURT: Okay. Thank you. Why don't I do this, instead of remarking it, why don't we substitute the

1 slip.

2 THE CLERK: With the same number?

3 THE COURT: Yeah. The number is the same just
4 switch the one from the slip -- actually, I think the one
5 was -- do you mind, Mr. Sears, the one was plastic, do you
6 mind having a paper --

7 MR. SEARS: No, that's fine.

8 THE COURT: -- slip cover so we can put that
9 one in the exhibit box? That's marked.

10 MR. BUTNER: Oh, okay. I get it. I
11 understand what you are saying.

12 MR. SEARS: This is magic. This took me a
13 long time. Boing. Here you go.

14 THE COURT: Did you put boing in the record?

15 THE COURT REPORTER: (Nods.)

16 THE COURT: Great. I suppose you need to.

17 THE BAILIFF: B-o-i-n-g.

18 THE COURT: That having been done, we don't
19 need to change anything in the record. We just have one
20 that will play now. Any other issues that we need to take
21 up before we get going, Mr. Butner and Mr. Sears?

22 MR. BUTNER: Not to my knowledge.

23 MR. SEARS: No.

24 THE COURT: You may proceed, Mr. Sears.

25

CROSS-EXAMINATION

BY MR. SEARS:

Q. Sergeant Huante, if I understand correctly when you were riding your bike on June 19th of last year, you weren't trying to do any GPS mapping because you were plenty busy with your bike and your camera?

A. Yes.

Q. And your recorder; is that right?

A. Yes.

Q. Can you tell me what in your mind you were trying to portray with this video that day? What were you trying to do?

A. I was trying to show the trailhead or the trail that I believed Mr. DeMocker was referring to.

Q. Were you concerned about trying to show somehow that Mr. DeMocker had not been truthful with you because you could cover the trail more quickly than he said he could?

A. No, sir.

Q. Okay. That wasn't part -- you weren't -

A. No.

Q. - trying to time this to somehow rebut what Mr. DeMocker had said about how long it took him?

A. No. My intent was to show the trail and the condition of the trail and what type of trail it was.

1 Q. Okay. If you can remember back now,
2 particularly having looked at your own video, that first
3 part of that little the Trail 309 that was so rocky, also
4 had a bunch of cat claw acacia bushes right on the trail
5 there in various places there, didn't it?

6 A. I believe so, yes.

7 Q. Yeah. Do you know that I'm talking about?

8 A. Some thorny bushes on the side. I remember
9 those -- some of those being on my socks when I was done.

10 Q. Yeah. Did you get any scratches on you that
11 you remember from your ride?

12 A. No.

13 Q. You told Mr. DeMocker, I assume that you were
14 being truthful with him, that the night of the murder that
15 you had been scratched up riding bikes, though, before?

16 A. Many times.

17 Q. It just happens, right?

18 A. Yes.

19 Q. And if I understand, again, the decision that
20 you made to ride your bike down to those gates and on
21 Trail 346 and down to that Cayuse Trailhead was based in
22 large part on what Miss Gerard, who is in here in Court
23 with us today, told you and Doug Brown a few days earlier
24 what she understood Mr. DeMocker to be saying about where
25 they went. You were just trying to go where she had

1 basically said Mr. DeMocker had indicated he had ridden,
2 correct?

3 A. True. I knew the beginning and I just needed
4 the end and that's that she provided.

5 Q. Now, when you say the beginning, when you
6 interviewed Mr. DeMocker in the early morning hours of
7 July 3rd right after the body was discovered, he told you
8 that he parked up on the street called Rainmaker that
9 evening before, correct?

10 A. I believe he did, yes.

11 Q. And presumably he would have to ride his bike
12 from Rainmaker and wind up there where you actually
13 started on Boone Court. You would have had to negotiate
14 the roads in that area to get down to Boone Court,
15 correct?

16 A. Yes, you do. Rainmaker is quite lengthy from
17 one end to the other. So it all depends on which end
18 you're at.

19 Q. Okay. Well, I guess, I'm really asking you is
20 when you started at Boone Court, were you really actually
21 starting at where Mr. DeMocker told you he started his
22 ride or where it made sense for you to park your car and
23 start your ride?

24 A. I was trying to get as close as I could to the
25 trailhead.

1 Q. To the trailhead?

2 A. Yes.

3 Q. As opposed to where Mr. DeMocker said he rode
4 up on --

5 A. Correct.

6 Q. -- on Rainmaker; is that right?

7 A. Right.

8 Q. Now, I can see -- at least I think I can see
9 in your video, when it's not being fast forwarded, what
10 looked like bicycle tire impressions from time to time on
11 the trail. Do you remember seeing them on June 19th of
12 last year?

13 A. I might have seen what was the remnants of a
14 track but I don't think you can clearly define the trail
15 -- the tire markings is what I'm trying to say.

16 Q. Based on what you just said, what you're
17 really trying to do was to video and to depict the trail
18 and the surroundings in that area. Were you paying
19 particular attention to whether or not there were shoe
20 print impressions or bicycle tire impressions on the
21 trail? Was that something you were also looking at?

22 A. No, no, sir.

23 Q. Okay. Do you know of any law enforcement
24 effort between the time that Doug Brown and Detective
25 Jaramillo went out in the very early morning of July 3rd

1 ever again looking on the places Mr. DeMocker said he rode
2 for bicycle tire impressions?

3 A. No.

4 Q. In -- in your testimony here this morning I
5 heard you to say that you were wearing some kind of
6 sneakers. I think that's what you said, right?

7 A. Yes.

8 Q. So you weren't trying to duplicate what
9 Mr. DeMocker might of had on his feet when he was riding
10 his bike, correct?

11 A. No.

12 Q. And I assume that you weren't making an effort
13 to find a bike that matched his, correct?

14 A. No.

15 Q. You used your bike?

16 A. Yes.

17 Q. And I don't mean to be impertinent but I don't
18 see you and Mr. DeMocker has being of particularly similar
19 body types?

20 A. True. I'm chunkier.

21 Q. And I would point out -- I think the record
22 says that Mr. DeMocker is some bit older than you are?

23 A. True.

24 MR. SEARS: Okay. I don't have no further
25 questions of Sergeant Huante.

1 THE COURT: Redirect?

2 MR. BUTNER: Nothing further, Judge.

3 THE COURT: Any objection to Sergeant Huante
4 being excused?

5 MR. SEARS: I have no objection.

6 MR. BUTNER: No objection.

7 THE COURT: You're excused, Sergeant Huante.
8 Thank you. Any other evidentiary presentation as regard
9 to this issue or --

10 MR. BUTNER: No.

11 THE COURT: -- other issues, Mr. Sears?

12 MR. SEARS: No.

13 THE COURT: Do you want to take up the motion
14 itself at this point in time?

15 MR. SEARS: I'm ready to do that, Your Honor.

16 THE COURT: Please, go ahead.

17 MR. SEARS: Thank you. Thank you, Your Honor.

18 As I pointed out in my motion it's been the law in this
19 State, and every place else that I'm familiar with for
20 decades, and in this State since, the mid-1950's, that to
21 the extent that one side or another in a criminal or a
22 civil case wants to present some experiment or
23 demonstration to the jury that as a general proposition
24 that the demonstration be found to be substantially
25 similar in material respects to the event that it is

1 attempting to depict or reconstruct, and that law has not
2 changed at all in Arizona over time.

3 And the reason we brought this motion now many
4 months in advance of trial is to get the Court to look at
5 and rule on whether or not going forward in their case in
6 chief the State should be permitted to use these
7 reconstructions. And there are several different
8 reconstructions here and they in their own way implicate
9 different items, I think. The first one is the use by the
10 State of Detective Brown's June -- I'm sorry, July 13th,
11 2008, hiking trip in this area. It is only audio
12 recorded. We didn't get into elaborate detail about what
13 he did but there are many more photographs that we've been
14 provided in discovery in which Detective Brown using a
15 hand-held GPS device would stop, enter an way point on the
16 device, and then take a picture of the screen on his GPS
17 device for mapping purposes.

18 I'm not really sure what, if anything, the
19 State is going to do with that GPS mapping information
20 because these are recognized trials about which the forest
21 service has produced a number of maps which the Court has
22 seen, and I think that the question is not where those
23 trials are precisely geographically but was Mr. DeMocker
24 riding where he says he was or was he someplace else as
25 the State suggests in this case.

1 In terms of whether this is an appropriate
2 reconstruction Detective Brown has told us pretty clearly
3 here today, I think, that on this hiking trip, on the June
4 13th trip, he really wasn't making an effort to even cover
5 the particular route that Mr. DeMocker had told the police
6 about in the early morning hours of July 3rd.

7 He didn't start up on Rainmaker. He didn't
8 do all of the paved portions of the route that
9 Mr. DeMocker described and he started at the Williamson
10 Valley Trailhead where Mr. DeMocker had specifically said
11 he was not. He said he gone there but had not ridden
12 there, and so I question what value, if any, this has but
13 that's really not the point of this motion.

14 The point is not whether it's relevant or
15 helpful to the trier of fact in this case in determining
16 something. It's whether just under the case law it is the
17 kind of reconstruction or experiment that is so
18 substantially similar to the event that it ought to be
19 allowed into evidence, and I think that the evidence is
20 pretty clear that it's not. It was never intended to be
21 an actual reconstruction.

22 Nonetheless, there are things about it, for
23 example, that the length of time was noted and Detective
24 Brown presumably if given the opportunity to testify about
25 how long it took him to walk from one place to another and

1 the State has argued in the past -- I do not know now
2 whether at trial they will continue to impress this
3 argument but they have argued in the past that
4 Mr. DeMocker was not being truthful and that the length of
5 his bike ride is at issue that the State contests and the
6 State says that Mr. DeMocker was not being truthful with
7 them about how long he was out on the bike and when one
8 way to establish that is to show that it would not have
9 taken that long whether you were on foot or pushing a bike
10 or whatever you were doing.

11 And so I am concerned that the State will
12 either argue that if given the opportunity or the jury
13 will be left to speculate about what this all means. I
14 think the simplest way to do this is to preclude, as I've
15 asked, the actual reconstruction itself.

16 I don't think that would extend to an order
17 precluding Detective Brown from testifying that at one
18 point less than two weeks after the murder he hiked on the
19 trails in that area but going beyond that and presenting
20 GPS information and time information contains the
21 potential, I think, to confuse the jury and to allow the
22 State to argue or to infer or to allow the jury to infer
23 that something about that experiment or that
24 reconstruction is contrary to what Mr. DeMocker said.

25 I think it becomes clearer when you take

1 Sergeant Huante's July 19th, 2008, bike ride he has said
2 just now, quite candidly, that he was not attempting to
3 rebut Mr. DeMocker's version with respect to how long he
4 was out there. I appreciate that candid testimony but,
5 again, I'm concerned that the jury will somehow
6 misconstrue what Sergeant Huante was doing as being the
7 State's version of what Mr. DeMocker actually did.

8 Again, I think that without question the
9 evidence so far is that Sergeant Huante only rode a
10 portion of what Mr. DeMocker told him his route was and
11 particularly when he got to the Granite Basin Road end of
12 the ride, was then relying on what Miss Gerard said she
13 remembered Mr. DeMocker telling her about this and they
14 didn't have precise information about where the ride
15 ended.

16 And that comes into play much more clearly on
17 what I think is the most troublesome reconstruction which
18 is the May 29th, 2009, bicycle ride by Detective Brown
19 because unlike his hiking trip and Sergeant Huante's
20 admittedly less than complete bike ride, I do think the
21 May 29th, 2009, experiment was designed to be as close as
22 the State could get to a reconstruction of the ride.

23 Detective Brown is more similar in built and
24 perhaps in perceived fitness level to Mr. DeMocker.
25 Although he is considerably younger. He is - his idea was

1 that he thought he was about the same level bike rider as
2 Mr. DeMocker because he felt that Mr. DeMocker had said he
3 wasn't really a rider, he's more of a runner, didn't ride
4 that frequently, and Detective Brown saw himself as being
5 in the same category.

6 He tried to ride as much as he was able to in
7 his own mind all of the ride including the portion on the
8 paved roads which would be up on the upper right hand
9 corner of the map on the easel there. Although I think on
10 cross-examination it may well be clear that he made some
11 assumptions about how Mr. DeMocker got from where he
12 parked his car up on the top of Rainmaker to the infamous
13 Boone Court 309 Trailhead that doesn't look like a
14 trailhead and Detective Brown agreed with me that it is
15 possible that Mr. DeMocker rode a longer distance and a
16 more difficult distance on the night in question, but
17 there are a couple of things about it that I think are
18 important.

19 On this ride, on the May 29th, 2009, ride he
20 was very concerned about time. He timed the going out and
21 he went so far as to walk his bike back and then tried to
22 proximate the times that Mr. DeMocker said he stopped to
23 pump up the flat tire of his own bike with the times that
24 he stopped his process to take -- to take photographs.
25 This to me feels much more like an attempt to reconstruct

1 this in an effort to rebut Mr. DeMocker's story about what
2 he was doing.

3 Ironically I think that if you take the time
4 of two hours and thirty-five minutes, which is what
5 Detective Brown has said it took him to do this ride, with
6 a ride out and a walk back, and you add back onto that
7 time what might be additional time it would take
8 Mr. DeMocker to cover the different ground involved in
9 this case and in a certain sense Detective Brown
10 corroborates Mr. DeMocker's story.

11 Sounds like this was about a three hour trip
12 that Mr. DeMocker described from about 6:30 to 9:30 on
13 July 2nd and I think that it could be argued fairly that
14 that would be within the range of the time that it took
15 Detective Brown to do the same ride.

16 Nonetheless, it is a reconstruction that is
17 flawed. It is -- the substantial similarities are
18 outweighed by the substantial dissimilarities. He was not
19 wearing bicycle shoes. It is, I think, within the Court's
20 ability to understand that it's easier to walk
21 particularly on uneven surfaces wearing hiking boots as
22 opposed to the kind of bicycle shoes that we've described
23 to the Court in previous hearing that have a cleat on the
24 bottom and then you add in the level of fitness, the
25 difference in age, and the discrepancy apparently between

1 where Mr. DeMocker described he was riding and where
2 Detective Brown actually said he rode and we get very
3 close but, yet, if unchallenged this would allow the State
4 to put into evidence an incomplete dissimilar
5 reconstruction and then argue from that that the jury
6 should understand that Mr. DeMocker was not being truthful
7 and leave us to cross-examine.

8 I think, again, the simplest and most correct
9 way to deal with that is to say that the dissimilarities
10 are significant enough to outweigh whatever baseline
11 similarities there are between the two reconstructions and
12 to not permit it.

13 There is other evidence that the Court has
14 heard evidence in previous hearings that GPS mapping, just
15 using a GPS device on the topographic maps for the route
16 that Mr. DeMocker said he rode would produce a ride of
17 almost exactly 11 miles. Detective Brown described a
18 round trip of about seven and a quarter miles.

19 So there's a substantial difference. I can't
20 do the percentages in my head but it is -- the difference
21 is nearly three and three quarters miles between the
22 measurements of Mr. DeMocker's ride and the measurements
23 of the Brown ride.

24 On the one hand I suppose that it might be
25 helpful to the defense to allow that in to show that

1 Mr. DeMocker was being utterly truthful and candid what he
2 did but I think that the potential for confusion by the
3 jury weighed against the benefit, if any, to the jury of
4 having this information from Detective Brown's ride,
5 should come down on the side of precluding this. This is
6 a less than scientific experiment done with an agenda,
7 this particular one.

8 To the extent that the Court likes Sergeant
9 Huante's video and thinks that it might be helpful to the
10 Court to have it in there, so long as the State
11 understands that they should not be, based on the evidence
12 deduced at this hearing permitted to argue that it's
13 actual reconstruction. It's just a scene video or
14 portions of this trial. I suppose we don't have a
15 problem. I would hope that by the time of trial we would
16 find a better way to show it to a jury then looking over
17 Sergeant Huante's shoulder.

18 I suspect that by the time we get to trial we
19 may prefer our own video done differently that would not
20 try to reconstruct the ride but would try to be a more
21 thorough and less bouncy version of the Huante video.

22 So in order, Your Honor, I would ask that the
23 Court preclude under the case law the -- Detective Brown
24 hiking, walking experiment. Preclude the State with
25 respect to the Huante video from arguing that it's

1 anything other than a depiction of the trail and the
2 scenery and preclude all together the Doug Brown May 29th,
3 2009, video because it of the group here seems to be --

4 THE COURT: Audio or video?

5 MR. SEARS: Did I say audio?

6 THE COURT: I think you said video.

7 MR. SEARS: I may have said video. It's an
8 audio recording but to get to preclude the State from
9 offering any evidence with respect to that reconstruction
10 because that was of the three instances the one part of it
11 that is -- it seems to us to be most calculated to be an
12 effort to reconstruct and rebut the version offered by Mr.
13 DeMocker.

14 And so I think that we are asking for slightly
15 different remedies for each of these three reconstructions
16 but nonetheless, all of them are subject to the same basic
17 case law structure which is they have to be substantially
18 similar and I think that I've done my best to present to
19 the Court our arguments with respect to the
20 dissimilarities on each of these occasions.

21 Of the three, as I said, the Huante video has
22 some potential utility to the jury but I think that with
23 all due respect to my friend Sergeant Huante, I think it
24 might be able to be done better by people with more
25 professional skills and perhaps better equipment if that's

1 the goal. Thank you.

2 THE COURT: Mr. Butner.

3 MR. BUTNER: With regard to Detective Brown's
4 visit, if you will, out to the scene of the bike ride, so
5 to speak, on July 13th, 2008, that was never intended to
6 be a reconstruction but rather that was, I think, we can
7 tell from the Detective's testimony his efforts to go out
8 there and figure out basically where this stuff occurred
9 and take some pictures and make sure that he was in the
10 right location and also use the GPS to make sure he was in
11 the right location.

12 So in terms of it being offered at any point
13 in time as a reconstruction, that will not happen, that
14 was not going to take place and it was never intended to
15 take place. And so if I understand the defense's argument
16 in regard to that, they don't have any objection to Brown
17 testifying as to what he did when he went out there, so as
18 long as it isn't offered as some sort of an effort to
19 reconstruct, and it will not be. It is not intended for
20 that.

21 Sergeant Huante's video, as you heard Sergeant
22 Huante testify, he was not there attempting to figure out
23 how long this bike trip took or any of that kind of
24 information but, rather, he was attempting to get on the
25 right trials and you heard his testimony about stopping

1 basically at each intersection and making sure he was in
2 the right place and then proceeding on and making sure
3 that he was not getting on the wrong trail.

4 Well, seems to me that this is actually a very
5 good effort on his part, and probably pretty accurately
6 demonstrates the conditions as they existed on the evening
7 of July the 2nd, 2008, in terms of the trail conditions,
8 and that's another key point and I think that Sergeant
9 Huante made that point when he was on the stand. He was
10 there to figure out where the trail was and what the trail
11 conditions were like so that he could show that and he did
12 that.

13 His video, although it's rather crude,
14 particularly when you consider that it was recorded from
15 the handlebars of a mountain bike, it's going to bounce
16 around and, I mean -- I think that you noticed -- you
17 could even tell when he had to pick his bike up, that a
18 camera went up in the sky and came back down and so forth.

19 I don't think that it's not going to be
20 offered for the purpose of reconstructing the Defendant's
21 ride on July the 2nd of the year 2008, and I think that it
22 will be of assistance to the jury so that they can see
23 what we're talking about here.

24 First of all, in terms of the trail -- using
25 the term trail rather loosely -- the trail at Love Lane is

1 rather hard to find, a little footpath, that basically you
2 have to know about it or you're not going to find it. You
3 have to know about it beforehand, so to speak. Can't find
4 it on a map. You certainly can't find it in the dark at 4
5 o'clock in the morning or anything like that.

6 And then once you found it, it's not easy to
7 ride on a bike either. I mean, this is a difficult trail
8 with boulders and rocks and dry wash and all kinds of
9 hazards along the way. Some of these things, of course,
10 tending to corroborate the Defendant's story.

11 So I think that Sergeant Huante's video, if
12 you will, is, in essence, substantially similar and an
13 accurate representation of the trail conditions and I
14 think that would be of significant benefit to the jury if
15 presented to them and would not be misleading in any way.

16 Now, coming to what appears to be the most
17 problematic of the three sought to be excluded is
18 Detective Brown's efforts on May 29th of year 2009 to
19 reconstruct the Defendant's ride. Within the limitations
20 that Detective Brown had and basically those limitations
21 are that he was not aware of exactly the route that the
22 Defendant took from Rainmaker, slash, Levie to the Love
23 Lane Trailhead. Seems reasonable for Detective Brown to
24 approach that with the assumption that you travel the most
25 direct route from the parking area to the trailhead and

1 initiate your ride. That right was approximately 10 miles
2 in length, all total.

3 And I would submit to the Court that this,
4 first of all, is not any kind of an effort to rebut
5 necessarily a story told but by Mr. DeMocker but rather is
6 a genuine effort to reconstruct the story told by
7 Mr. DeMocker and as Mr. Sears candidly admits in some
8 respects it may very well corroborate just exactly what
9 the Defendant said.

10 This is not, I would submit to the Court, a
11 reconstruction where the dissimilarities outweigh the
12 similarities. Rather, the similarities are substantial
13 not only in time but in length from Love Lane all the way
14 across to the turn around at the Cayuse Trailhead which
15 although imprecise is within minutes in terms of location
16 where Mr. DeMocker turned around, and even at that point
17 it seems to me that that is substantially similar to the
18 ride described by Mr. DeMocker, and this is a
19 reconstruction that was designed to be substantially
20 similar.

21 Certainly Detective Brown is subject to
22 cross-examination by some of the assumptions that he made
23 which he readily admitted and by any portions of that
24 reconstruction which at all seems to make sense to me,
25 Judge, but from the defense point of view there was a

1 suggestion that Mr. DeMocker might go a different route if
2 he were walking his bike or something like that, that may
3 be true, but in terms of Trail 346 to 347 and down to, I
4 think, it's 309, all of those things are the same as
5 reported by the Defendant, that means it's substantially
6 similar and I would ask that the Court allow the State to
7 present that evidence to the jury at the time of trial.

8 THE COURT: What's the point of the
9 reconstruction being presented to the jury?

10 MR. BUTNER: The point is that, first of all,
11 we have a homicide that occurs at a certain hour of the
12 day, and then we have the Defendant's -- his alibi, so to
13 speak, and he does haven't a witness for that necessarily
14 in terms of the substantial period of time but his alibi
15 is that he's out on the trail going from here to here and
16 then from here to here back again, experiencing a flat
17 tire along the way, necessitating him walking and carrying
18 his bike and so forth.

19 Seems to me that an effort to duplicate what
20 he said is for the jury's edification in determining
21 whether his story holds water which is exactly why the
22 defense would want to do such a duplication, so to speak,
23 or reconstruction of his ride to see if his story holds
24 water. The story is going to come in.

25 THE COURT: And ultimately the results of the

1 testing are within a range of differences that it actually
2 corroborates what Mr. DeMocker says.

3 MR. BUTNER: It may. It may corroborate what
4 Mr. DeMocker says. It may not if other aspects of
5 Mr. DeMocker's story don't make sense. He could go one
6 way or he might have gone a different way. We only have
7 it within certain limitations which the detective readily
8 admitted and within those limitations I think that
9 reconstruction is basically very accurate.

10 THE COURT: Thank you. Mr. Sears.

11 MR. SEARS: Thank you. Briefly, Your Honor.
12 I have to say, Your Honor, I was waiting for Mr. Butner to
13 volunteer to agree that Mr. DeMocker was riding his bike
14 on this trail that night. He was getting so close to
15 saying that the reconstruction of Detective Brown on May
16 29th of last year was so close to what Mr. DeMocker was
17 saying that would corroborate that. I think that's a
18 remarkable movement by the State in this theory.

19 Our concern until now has been just the
20 opposite is that the State would argue somehow that
21 because Detective Brown could do it more quickly, that
22 Mr. DeMocker must have been lying and that his alibi
23 doesn't hold water. What I have to say is I'm gratified
24 to hear that maybe the State is not seeing it that way and
25 I think that in part due to the honest testimony of the

1 two detectives that did that work.

2 Here's what I think the problem is with
3 respect to the Brown reconstruction. Any time --

4 THE COURT: The May 29th one?

5 MR. SEARS: The May 29th one, yes. I'm sorry.
6 The May 29th bicycle ride. In my view any time that you
7 present to the jury through the foundational questions of
8 direct examination, I got my bike out, you know, the
9 report -- which you don't have -- but the report says I
10 was going out and was asked to go out and see if I could
11 duplicate Mr. DeMocker's supposed ride that night and he
12 starts in the place that for the first time in these three
13 reconstructions -- he starts in the place where
14 Mr. DeMocker says he was. He goes to where he thinks he
15 said he ended. He walks his bike back. He does a number
16 of different things.

17 Doesn't do them all. Doesn't flatten the
18 tire. Doesn't wear bike shoes. Doesn't make himself 54
19 years old. Doesn't do it in the evening after a long day
20 at work. There are lots of things about the
21 reconstruction that are different, but the point is once
22 you go down that road, I suggest on direct examination, if
23 you're the prosecutor in this case with the jury, surely,
24 you want the jury to grasp onto this idea that this is a
25 scientific experiment.

1 This is the police with all of the trappings
2 of police work and detectives trying to show the jury why
3 something isn't so. And if what they're saying is at the
4 end of the day or at the end of the ride, in fact, it is
5 so close as to what Mr. DeMocker said he was doing as to
6 be similar, hooray, I suppose is one way to look at it.
7 We would be happy to hear it, but I fear that the State
8 will not want to do that.

9 I fear that the State will want to argue that
10 as Mr. Butner hinted that there is something else about
11 this that when coupled together with other things, they
12 want the jury to understand or think about Mr. DeMocker
13 will show that this is not true, and then you go back to
14 the question of what did they just presented.

15 They presented something that is a quasi
16 scientific reconstruction experiment that doesn't comply
17 with the standards for such a demonstration and I think
18 that -- I think that the safest way to keep the State from
19 veering off into this problematic area is simply not to
20 permit them to use this because the law authorizes you to
21 do that.

22 The law says that when there are sufficient
23 dissimilarities the experiment cannot be presented to the
24 jury as such, and I don't necessarily share the same view
25 as I said now about the Doug Brown's height or even

1 Sergeant Huante's brave attempt at videoing his bicycle
2 ride.

3 I think there are other problems with those
4 but I don't particularly -- now that I hear the State's
5 agreement that those are not reconstruction and would not
6 be offered for that purpose, but I did not hear any
7 similar avow by the State with respect to Doug Brown's
8 experiment. And I can only think then that they will want
9 at some point to bring it forward to the jury as a
10 scientific reconstruction and then somehow argue backwards
11 out of the facts to some back conclusion to the defense's
12 point of view, and that's the problem that I have with
13 what's been done.

14 And it's one thing to show the jury or to
15 describe to the jury or to even teach yourself if you're a
16 police officer that's unfamiliar with this area, what this
17 is all about. It's another thing to really go to some
18 great effort to try and make this look like a faithful
19 reproduction of a particular event.

20 There are couple of things about this that are
21 troubling to me from the beginning and have been to all of
22 us on the defense side. We are terribly disappointed that
23 all the police did, as you heard again today, to try and
24 corroborate Mr. DeMocker's alibi with bicycle tire
25 impressions -- in the same manner that they quickly jumped

1 to the bicycle tire impressions -- we'll hear more about
2 the land near the crime scene -- was to go out and come
3 incredibly close, probably within feet of where
4 Mr. DeMocker was riding his bike, but then give up the
5 search because they didn't know about it, and then do
6 nothing for the next 10 days.

7 Absolutely nothing. To go out and look at
8 tire impressions but then you have this amazing event on
9 July 13th where Doug Brown goes out and says they're
10 bicycle tire impressions everywhere but he doesn't do
11 anything about those. So another opportunity came and
12 went to finish off the corroboration of Mr. DeMocker's
13 story and put an end to all of this.

14 Had the State made anywhere near the effort to
15 look at those bicycle tire impressions that Doug Brown saw
16 and that probably Luis Huante saw on the 19th, although,
17 he honestly said he wasn't looking for them, if they had
18 simply gone back and looked on the trail they would have
19 found Mr. DeMocker's bicycle tire impressions that would
20 have corroborated his alibi and, quite likely, we wouldn't
21 be standing here. Thank you, Your Honor.

22 THE COURT: Well, I recognize that it was
23 pointed out to me previously that this was the most common
24 type of bicycle tire. What I have in terms of Deputy
25 Brown's attempts to go out and examine the scene on May

1 29th is obviously different legs, different age, different
2 size, weight, perhaps different fitness level, different
3 shoes, potentially different bike, different tires.

4 At least I haven't been presented with some
5 identity or close identity between the bike that he had
6 and the bike that Mr. DeMocker had and it seems clear that
7 the effort was being made there to time what happened and,
8 you know, there are so many distinctions, and my
9 conclusion after listening to the testimony is that, as I
10 indicated to Mr. Butner, there is perhaps even
11 corroboration on the amount of time if you have the
12 starting point that Brown did and have the ending point
13 that Brown did.

14 Trouble is we don't know -- we roughly know
15 where the starting point was based on what Mr. DeMocker
16 said to the police of where he was but it wasn't clear
17 where the ending point was or the pace with which
18 Mr. Brown walked versus the pace Mr. DeMocker walked.

19 You can't -- I don't think that I can portray
20 what Detective Brown did as a scientific experiment
21 because that's -- a scientific method assumes that there
22 is some ability to replicate on subsequent times what
23 occurred and human beings being what they are and with
24 different heights and weights and strides and age, those
25 efforts, I think, are not capable of being scientifically

1 duplicated.

2 The question I suppose is whether this is
3 close enough for admissibility and I think that you go
4 back to the general relevancy rule, and in doing so, I
5 guess, I find that there's some marginal relevancy to it
6 but there's -- as against that, there is a significant
7 danger of misapplication, confusion, misleading of the
8 fact finder by entering the information about the May
9 29th, the efforts of Detective Brown -- I'm not sure that
10 you call it an experiment or you call it a reconstruction,
11 and I'm not sure that -- I'm very sure that what Detective
12 Sergeant Huante was doing was not an effort of
13 reconstruction but simply documenting of what the nature
14 of the trail is and his videotape, although somewhat
15 bouncy because of how it was conducted, I think still has
16 relevance to be able to show the jury generally the nature
17 of the area.

18 And I'm not saying that the measurements that
19 were conducted in terms of distance from Point A to Point
20 B along the trail through the use of GPS devices or
21 otherwise would not be valuable to the jury. I think
22 those are permissible. Photographs taken are permissible
23 of the general scene.

24 You may even want to -- I think it's -- I
25 think it borders on irrelevancy but if you want to have

1 the photographs of the GPS device and what it was showing
2 at a particular time that has some marginal relevancy for
3 being able to document the points where photographs were
4 taken and the like, but in terms of doing a time
5 reconstruction of what occurred, I think that the motion
6 in limine is appropriately brought to the attention of the
7 Court and is granted.

8 With regard to Detective Sergeant Huante's
9 video, though, I'm not going to grant that. It's not --
10 it's not for purposes of a demonstration of time. It's --
11 in fact, he doesn't try to duplicate what Mr. DeMocker
12 says. So Sergeant Huante when he was out there rode out,
13 rode back. He's not trying to put a stop watch on this.
14 Clearly, he's not doing what Mr. DeMocker said, and even
15 though he might be closer in age to Mr. DeMocker, there's
16 still significant other differences between the two
17 gentlemen.

18 So I think that the photographs, the video are
19 admissible in the State's case in chief. Should the door
20 be opened, I suppose that I may allow some additional
21 testimony by Detective Brown with regard to what he did if
22 the door is opened on that but at this point for the
23 purposes of the State's case in chief I'm going to bar the
24 testimony, exclude the testimony, with regard to that
25 because insufficiently similar to what was presented for

1 the events that are really at issue in the case.

2 Clarification necessary of the ruling,
3 Mr. Sears?

4 MR. SEARS: I'm sorry, Your Honor?

5 THE COURT: Any clarification necessary?

6 MR. SEARS: No, Your Honor. I think I
7 understand.

8 THE COURT: Mr. Butner, any clarification
9 necessary?

10 MR. BUTNER: Judge, I think I do understand
11 Detective Huante's ride, so to speak, is admissible
12 assuming the proper foundation, of course. The distance,
13 measurements made by whomever, either Detective Huante or
14 Detective Brown, they're admissible. Photographs taken
15 along the way, they're admissible.

16 The thing that is not admissible is, in
17 essence, the time calculated by Detective Brown in terms
18 of his efforts to reconstruct the ride of Mr. DeMocker as
19 described by Mr. DeMocker and as also described through
20 Rene Gerard for the evening of July the 2nd that
21 reconstruction, especially time wise, is not admissible.

22 THE COURT: In the State's case in chief.
23 Now, if the door is opened, we may revisit that issue.

24 MR. BUTNER: I understand. Thank you, Judge.

25 THE COURT: Next matter then, John.

1 MR. SEARS: Your Honor, we thought if -- the
2 view what it is, is that we would want to finish up the
3 jury questionnaire matter which we think is related to the
4 capital jury project motion and death qualification issues
5 and we would like to take them up in that order.

6 I don't think it would take that much more
7 time to resolve the differences between the State's
8 overnight draft and our overnight draft of the
9 questionnaires, and we have the benefit of some
10 information from our consultant that we would like to
11 provide to the Court about some of the things we talked
12 about yesterday.

13 THE COURT: We'll go back to the motion
14 numbered 1 in your listing.

15 MR. SEARS: If we could just have a minute to
16 get our draft or the draft questionnaire up on our
17 computer here. I'm sorry, Your Honor, I didn't realize
18 that Ms. Chapman stepped out. She was my last hope to get
19 this transcript up.

20 THE COURT: Do you want to go onto the other
21 issues?

22 MR. SEARS: Are you ready to talk about --

23 MR. HAMMOND: Yes.

24 MR. SEARS: If we could just pick up the
25 capital jury motion. Mr. Hammond is prepared to speak to

1 that.

2 THE COURT: This is the one Numbered 11 in the
3 listing that you gave me yesterday.

4 MR. HAMMOND: Do you have our motion there,
5 Your Honor?

6 THE COURT: I do.

7 MR. HAMMOND: There are a couple of tables
8 that I might wish to refer to that I think would be
9 helpful.

10 THE COURT: Mr. Hammond.

11 MR. HAMMOND: Thank you, Your Honor. As the
12 Court I believe well knows in the process of the defense
13 preparation of its -- of its case we have been working on
14 what we generally refer to within our defense team as the
15 omnibus challenge to the death penalty under the Federal
16 and State Constitution.

17 And we will be in reasonably short order
18 filing a motion which will address a series of issues that
19 have caused us to come to this Court to argue that the
20 Arizona death penalty system as it exists on its face and
21 as it might be applied in Mr. DeMocker's case is
22 unconstitutional.

23 In the course of our work on that larger
24 motion, the work of what is known as the capital jury
25 project came up many times, and as we approached the jury

1 questionnaire work back in November and then in the
2 proceedings in this Court on the 9th and the 16th of
3 December, it became increasingly apparent to us that it
4 would be valuable for us to essentially pull out a part of
5 our larger challenge to the death penalty and provide it
6 to the Court as a separate motion and that's what we did.

7 We decided that it would be productive to
8 share with the prosecution and the Court the findings of
9 the capital jury project and to argue it in connection
10 with our planning for the jury selection in this case.
11 The motion that we have filed and the very large set of
12 materials that we attached as a CD are based on what we
13 would submit is one of the most remarkable, empirical
14 studies of the death penalty conducted in the United
15 States. Certainly, since the reinstitution of the death
16 penalty after *Gregg v Georgia*.

17 The study itself is known as the capital jury
18 project as we summarized and as the papers attached show
19 it is a study that was funded by the National Science
20 Foundation. It was a heavily peer reviewed study. It is
21 the culmination of field interviews of jurors who sat on
22 death penalty cases around the country from 1990 for the
23 next few years.

24 During that time the participants in the
25 capital jury project interviewed approximately 1200

1 jurors. And I stress, again, capital jurors who had sat
2 through a death penalty trial from beginning to
3 sentencing. So we're talking about people who had actual
4 live experience with serving on capital juries in 13 or 14
5 states. Of course, at the time this work was done Ring
6 had not yet been decided. So Arizona was not included in
7 the studies but you can see from the list of states that a
8 very broad number of states from around the country, from
9 all sides of the country, and those states that still do
10 have the death penalty, were used for the study.

11 Just as a matter of social science research
12 this is a remarkable work product and it is one that even
13 if we had no death penalty issues here, I think that all
14 of us as lawyers and the judiciary would look at this and
15 say that's some pretty extraordinary work. We do a lot of
16 speculating about what jurors think or how they respond,
17 well, this is the study that I think is based upon what
18 they actually observed.

19 There are a few things about that study that
20 we thought were particularly important and that we wanted
21 this Court and the prosecution to think about as we -- as
22 we -- as we sort through the questions about how to do
23 this trial and how to select a jury.

24 Let me take the key ones one at a time and
25 I've chosen to really only talk about four of the primary

1 conclusions, and I'm not going to stand up here and recite
2 that entire brief, but there are four things that we have
3 pulled out of it that we think are worth taking a close
4 look at.

5 The first is the portion of the study in which
6 jurors were asked when in the process they made their
7 decision on what the sentence should be. A question that
8 many of us are even unwilling to ask because we like to
9 assume that jurors abide by the instructions and do not
10 make decisions with respect to sentencing until after the
11 guilt and innocent phase of the trial is over.

12 What this National Science -- National Science
13 Foundation study concluded shockingly is that more than 49
14 percent of the people interviewed acknowledged that they
15 had made up their mind about life or death before they
16 even got to the sentencing stages, before they got to the
17 presentation of aggravators, or the presentation of
18 mitigating evidence.

19 The chart, Your Honor, on Page 8 of our brief
20 tracks through the results in 13 states and as the chart
21 shows in 30 percent of the interviews jurors acknowledged
22 that they prematurely made up their mind on death before
23 they got to the end of the evidence presentation. Another
24 looks like about 19 percent made their minds up that the
25 Defendant should get life and did so before the sentencing

1 stage had begun.

2 Of all of the conclusions, and I think this
3 is the one that has received the most scholarly attention
4 and the most national attention, this is maybe the most
5 startling and some have said inexplicable, the idea that
6 jurors would be told that you're not to make up your mind
7 about what the sentence should be until after we decide
8 guilt or innocence, and then to have jurors candidly
9 acknowledge that they were unable to do that, itself, I
10 think, says a lot about whether we have developed a system
11 that is anything like what the United States Supreme Court
12 hoped it was doing when it wrote decisions like Gregg and
13 Lockett and the other cases that we have all become so
14 familiar with.

15 The question asked of -- asked of former
16 jurors about why they came to those conclusions were very
17 much on my mind the last few days as we talked about this
18 jury questionnaire. Some jurors said, well, it just
19 seemed like if this crime occurred, the crime was just so
20 egregious that it was going to have to be a death penalty
21 case.

22 Other people said, and I think similarly,
23 it's the gruesomeness of the photographs. Well, we're
24 going to talk about gruesome photographs but when I've
25 read over the last few years that portion of the study,

1 I'm always shocked by how much of an impact in cases
2 across America the visual impressions of photographs have
3 made. Even though you have cases in which, as in this
4 case, the Defendant shares the view that the crime scene
5 is a horrible place, that a terrible homicide occurred, to
6 many people it just doesn't matter.

7 It's the offensiveness of those photographs
8 both the crime scene and the autopsy photographs, that
9 cause people to say, well, this is the case in which death
10 ought to occur. There are other people who you see here
11 in our notes who said, well, you know, the thing that
12 persuaded me was just how strong the case was.

13 Well, the strength of the case, that is the
14 strength of the guilt or innocence if the case, has
15 absolutely nothing to do with how we go about deciding
16 what the sentence is but, yet, we get scores and scores
17 and scores of people saying, almost as night follows the
18 day, that it's that which brought them to believe that
19 either a sentence of death or in some cases a sentence of
20 life was the appropriate result.

21 And then there is the other consideration
22 that frankly, Your Honor, is one that troubles me deeply.
23 Many jurors, and we're talking about hundreds now, said
24 one of the things that impressed them most was the
25 demeanor of the Defendant. And these are cases, many of

1 which, that the Defendant didn't testify. And for those
2 of us who think that jurors follow the instructions and
3 draw no inferences or no conclusions about anything other
4 than the evidence presented on the witness stand, this
5 kind of study has got to be alarming.

6 The very idea that we could be in a courtroom
7 concluding that the Defendant is probably guilty because
8 we don't like his demeanor, we don't like the way he rolls
9 his eyes, or the way he talks to his lawyers or his
10 investigator, those kinds of conclusions have got to cause
11 all of us to think what is this system about.

12 We spend all of this time trying to craft an
13 approach to separate who should live from who should die,
14 and, yet, we find after the fact that there are things
15 like this that a jury may never had even heard but that
16 wind up being the factor that causes them to believe that
17 death is appropriate or in some cases causes them to
18 believe that life is appropriate. So that portion of this
19 study I think, suffice it to say, is cause for alarm as to
20 whether this system can work at all.

21 The second area that I thought it would be
22 worth it to spend a minute on this afternoon is the
23 portion of the study that deals with the jury selection
24 process itself and whether the jury selection process that
25 we've all talked so much about for the last few days

1 really achieves its goal of ridding the jury pool of those
2 people who have already made up their minds.

3 The idea that we can identify and remove
4 those jurors who should be identified and remove people
5 who have -- who have a death bias, this study tells us we
6 ain't doing it. We simply have not been able to find a
7 way to identify people who shouldn't be on juries and so
8 on Pages 14 and 15 we'll see some of the kinds of cases in
9 which jurors conclude that if this kind of crime occurred,
10 death is the only acceptable alternative.

11 And the category, Your Honor, that I find
12 most disturbing is the category of what the study calls
13 planned and premeditated murder. Prosecutors are taught
14 -- and I think at one point in my career I was taught that
15 if you want to get a guilty verdict in a death sentence,
16 what you emphasize is planning and preparation because to
17 the extent that a homicide is found by the jurors to be --
18 to be premeditated, not in the technical, legal sense but
19 in the sense of any kind of planning, people will jump to
20 the conclusion that if we find them guilty, we're going to
21 sentence them to death.

22 And the numbers here -- I mean, the idea that
23 that could happen in 57 percent of the cases or 50 percent
24 of the interviews, is, I think the -- well, to call it
25 troubling doesn't capture the concerns that I think all of

1 us as lawyers and as members of the judiciary should have.
2 Maybe it's a corollary to that, the study people, the
3 people responsible for this, wanted to address the
4 question, well, do people understand or do they not
5 understand the instructions that they've been given.
6 We've talked a lot about explaining to jurors that there
7 are separate phases of the trial and that there are some
8 things that have to be found beyond a reasonable doubt.
9 That's going to be true of guilt. That's also going to be
10 true of the aggravating factors but that mitigating
11 factors don't have to be proved beyond a reasonable doubt and
12 every one of these trials, these kinds of instructions, in
13 one set of words or another, all intending to get at the
14 same thing, were given and, yet, if you look at what we
15 find out, after the fact, I think you have to look at this
16 and say well, shoot, we failed.

17 I mean, if you look at Pages 21 and 22 of
18 this study, again, in those 13 states just take the four
19 categories that we've listed across the head of that table
20 and everybody in this courtroom knows that these are some
21 of the very things that we have talked about and that we
22 will continue to talk about if this case goes forward as a
23 capital case.

24 One of them is do the jurors understand that
25 they can consider any mitigating evidence they wish. Look

1 at the percentage of jurors who failed to understand that.
2 44 percent. You wonder how is that possible. Well, it is
3 not only possible, it happened, and it happened in states
4 all over the country and some of them you look at the
5 percentages and they are really, really disturbing.

6 What about the idea that the jurors need not
7 be unanimous in their finding of mitigating evidence.
8 Well, two thirds of jurors don't get that concept. What
9 about the idea that they don't need to find mitigation
10 beyond a reasonable doubt. Reasonable doubt has nothing
11 to do with finding mitigation. Again, half of the people
12 studied didn't understand that.

13 And then this last category which captures 30
14 percent of the people in this study that the very basic
15 idea that in order to find an aggravator they have to find
16 that aggravator beyond a reasonable doubt. Well, we know
17 that if this case goes to trial as a capital case and the
18 jury is impaneled in this box, Your Honor, that's exactly
19 what you are going tell them and that will be what
20 Mr. Butner will tell them. He'll stand up -- and I know he
21 will, that's the law. He won't try to hide from that. He
22 won't say, well, that doesn't really count. He'll say
23 that's exactly what it is. And if this study is anything
24 but a tissue of fiction, 30 percent of those people will
25 simply not be able to understand that in order to find

1 aggravation they have to find it beyond a reasonable doubt
2 as to each particular aggravator.

3 The last of the four things that I wanted to
4 mention is one that we tried to capture in the table that
5 the Court will see on Pages 23 and 24 of our -- of our
6 memorandum. This is one of those topics that lawyers and
7 Courts talk around but rarely talk directly about at least
8 in our judgment and that's the question of what it means
9 to instruct a jury that they may find an aggravator based
10 upon finding that the conduct was especially cruel,
11 heinous, or depraved.

12 Almost every state has some kind of
13 formulation of those words. Arizona is, as the Court
14 knows, far from being unique in this case. Different
15 phraseology is used in various states but this same
16 concept appears over and over and over again. And as the
17 jurors are going through the trial they are asking
18 themselves is the Defendant's conduct -- if they believe
19 that the Defendant committed the crime, is it heinous, is
20 it vial, is it depraved, and the people answering that
21 question are people who have zero compass.

22 These are not people, unless this is a very
23 extraordinary jury, in which there will even be a single
24 juror who has ever had to answer that question before.
25 They will not have any frame of reference. They will not

1 be able to say as the Arizona Supreme Court says and the
2 United States Supreme Court says, well, the crime must be
3 especially cruel, heinous, or depraved.

4 Well, we can all ask ourselves how on earth
5 does the juror even begin to assess that question other
6 than turning to their gut reactions to whether the
7 photographs bother them, whether the alleged conduct was
8 gruesome, but we know this from this study if the jurors
9 believe that the crime involved heinous, vile, or depraved
10 activity they are going to find that the death penalty is
11 appropriate in over 40 percent of the cases. I guess we
12 should say, well, that's not a surprise, but it was to me.

13 The first time I read this study I always
14 believed that people -- that you could talk to a jury and
15 say you don't, you know, we don't claim that this crime --
16 whoever committed it, was not a terrible crime, but how in
17 the world can we talk to you about whether this crime is
18 more heinous or depraved than any other. I submit there
19 isn't a lawyer with sufficient talent to be able to do
20 that in a meaningful and appropriate way.

21 So, Your Honor, those conclusions from the
22 capital jury project have caused us to urge this Court,
23 first of all, to conclude as we have in this motion and as
24 we will continue if need be, to say that the Arizona death
25 penalty is simply not capable of application in the way in

1 which we intended it as a legal and structural matter to
2 work that it just can't work, and for that reason the
3 first thing that we urge in this motion is that the Court
4 knowledge that and simply say that this death penalty
5 system is unconstitutional.

6 We also make a second suggestion, and it's a
7 suggestion that comes from the experience in the State of
8 New Mexico, our sister State to the east when judges and
9 lawyers in that State confronted these same results. And
10 in the State of New Mexico after these studies were
11 presented, eventually -- as I believe the Court knows the
12 rule in New Mexico was changed. Now Governor Richardson
13 has concluded that there will be no death penalty in New
14 Mexico but before he concluded that, aided by this study,
15 the decision was made in New Mexico that there needs to be
16 two juries in every capital case. That we ought to give
17 up on the fiction that we can impanel one jury that will
18 be able to distinguish guilt, innocence from sentencing
19 related issues, and in the State of New Mexico that is
20 what they did by rule and we cited the rule in our -- in
21 our papers.

22 We would urge that this Court do precisely the
23 same thing. That a try trier of fact be understood to be
24 in this case, if necessary, two separate juries. That the
25 first phase of this case would be a phase in which the

1 jury that is impaneled would not be death qualified. We
2 wouldn't go through the process that we've gone through in
3 the last few days of trying to structure a questionnaire.

4 We would simply say, as I'm sure that this
5 Court often says in noncapital cases, you are to give no
6 consideration to what possible range of sentences might be
7 imposed. You are just here to determine one thing, guilt
8 or innocence.

9 We strongly urge that the Court consider doing
10 that and if contrary to what this defense team is
11 convinced should happen, there is a guilty verdict, then
12 we can impanel another jury at that point to address the
13 questions of aggravation, mitigation, and ultimate,
14 leniency in the eyes of the law.

15 If -- at least if the jury trial were done in
16 that way with those components we could all rest a little
17 bit easier, and I say a little bit for reasons I'll
18 mention in a moment. We could rest a little bit easier
19 with studies like this that make, as I said earlier,
20 largely a fiction of what we try to do. And I say a little
21 bit because there is -- it's going to be difficult for us
22 to find 16 jurors, 12 and at least 4 alternates, that are
23 not going to have learn enough about this case to have
24 their own suppositions about what the punishment might be,
25 but I think we come closer to the goal of justice if we

1 say, ladies and gentlemen, that's not your job, that's not
2 why you're here. We don't want you to do anything other
3 than weigh the evidence and make a determination with
4 respect to whether the State has met its burden of proof
5 of guilt beyond a reasonable doubt. Period. At least if
6 that were the system we would have a reasonable chance of
7 believing ultimately that justice could be done in this
8 case. Thank you, Your Honor.

9 THE COURT: Mr. Butner.

10 MR. BUTNER: A tough person to follow.
11 Mr. Hammond speaks eloquently about a subject which he is
12 passionately committed to and that's certainly to his
13 credit, Judge, but I would submit that his goal and the
14 defense goal in this case and the project and the
15 statistics that he cited basically are what they got
16 Governor Richardson in New Mexico to do and that is to
17 make sure that no death penalty gets imposed at any time.

18 And he talked about the goal of justice and I
19 think, you know, in referring to justice as a noun, it is,
20 and that's accurate but also justice is a process. And in
21 this country for a long time we have had a process, we
22 refer to it, of course, as due process, that's what
23 lawyers and judges talk about frequently. Due process.
24 Did the Defendant, did the accused receive due process.

25 And we look at that -- both sides of the

1 aisle, we look at that and both sides are trying to make
2 sure that the accused receives due process. We have
3 different ways of going about that. We have what we
4 believe to be different parts of that due process.

5 I'm sure this Judge remembers that for the
6 death penalty in Arizona for a substantial period of time
7 Judges were the decision makers in terms of whether
8 aggravating factors were present of sufficient strength to
9 outweigh mitigating factors, and when we talk about
10 factors we're really talking about aggravating evidence as
11 compared with mitigating evidence, and then the Judge made
12 the decision.

13 People on the defense side of the due process
14 argument didn't think that Judges should be making those
15 decisions. And I, quite frankly, agreed with them. I
16 think that's just too much to put on one person. Plus, I
17 think our constitution, in essence, mandates that a jury
18 should be making those kinds of decisions and that's where
19 we come back to that due process discussion again.

20 In the United States of America and in
21 Arizona when it comes to whether somebody should receive
22 the death penalty, we have decided that that is a very
23 fundamental question, to state the obvious, which should
24 be decided by a jury.

25 I think we're all proud of this courtroom of

1 the fact that we bring these criminal cases to Courts and
2 we try these criminal cases to juries. We want citizens,
3 ordinary citizens in our State and counties to be the
4 people that sift through the evidence presented to them
5 and decide what's stronger, what weighs more heavily than
6 other pieces of evidence, and then ultimately conclude
7 what the true facts are, so to speak, and make their
8 decision accordingly.

9 Now that we have gone through this Ring
10 process, so to speak, in the State of Arizona and we
11 presented the death penalty issue to juries, now they want
12 to take that away from juries. They want to make that
13 process unconstitutional or they want to get a couple of
14 juries to decide that because we don't want the jury who
15 listened to all of the facts in the trial of the Defendant
16 and made a decision as to whether the Defendant was guilty
17 or not, we don't want that jury then to be the jury that
18 decides whether he should get death for the crime that
19 they found he committed.

20 Well, in the State of Arizona our law's very
21 clear that that jury can consider all of that evidence
22 that they heard in the trial of the Defendant and not have
23 another retrial, so to speak, to a second jury but can
24 consider all of that evidence and decide whether all or
25 portions of that evidence support all or some of the

1 aggravating factors that are alleged. And they can also
2 consider that evidence in determination of whether there
3 is mitigation for the Defendant as well as, of course, as
4 any other evidence that's presented in the penalty phase
5 of the trial.

6 I would submit that we have got due process
7 now. We have got a constitutional process. The Arizona
8 Supreme Court, the United States Supreme Court, they have
9 found that trying these cases to one jury that hears all
10 of the evidence and makes the decisions is appropriate in
11 this State.

12 And, you know, it's funny that -- and I say
13 funny, I don't mean in a humorous sense but rather in a
14 peculiar sense, it's funny that Mr. Hammond and people
15 that argue about the death penalty from his point of view
16 focus on in many instances the gruesome photographs.

17 Well, the purpose of photographs in a trial is
18 not to shock the jury but rather the purpose of
19 photographs in a trial is to present to them evidence of
20 the crime so that they can understand the true nature of
21 that crime, and to suggest that ordinary citizens of our
22 State or ordinary citizens of our county don't have a
23 compass to determine what's heinous or depraved, that is
24 shocking to me because it certainly diminishes the value
25 of what we do in this courtroom at least that argument

1 does.

2 It certainly diminishes the value of what
3 those ordinary citizens do when they sacrifice so much of
4 their time to sift through all of the evidence that gets
5 presented in a case like this and to listen to lawyers
6 argue on and on and on ad nauseum. There are various
7 points of view and then to sit there and listen carefully
8 to the instructions of the Court and then take it upon
9 their shoulders the responsibility, first of all, the
10 awesome responsibility of deciding whether somebody is
11 guilty or not, and then to shoulder the responsibility of
12 the type of sentence that they should receive for a crime
13 of first degree murder.

14 I believe in this system. I believe that we
15 do not -- as to use Mr. Hammond phrase -- have a system
16 that exists in a vacuum or is a tissue of fiction. I
17 believe that this manner in which juries in Arizona impose
18 the death penalty and, of course, it's been upheld many
19 times to be constitutional, that it's a carefully designed
20 system that allows for a single jury to properly and
21 impartially apply the law to the facts of the case in both
22 the guilt and sentencing phases of a capital trial.

23 And I would submit that we should not allow
24 Judges to take that away from juries. We've seen that
25 happen in this county. I still smart from that happening.

1 I think still that's wrong. I don't think that Judges
2 should do that. I don't think that citizens of the State
3 of Arizona want that happening. They realize that they
4 have a responsibility. They realize they have a right to
5 sit as a juror and they give that their best efforts.
6 They are the conscious of our community, not lawyers, not
7 judges, but jurors and they are the ones that should be
8 making a decision as to whether a Defendant should be
9 punished by the death penalty for the crime that they have
10 found the Defendant guilty of. So I ask that the Court
11 deny the defense motion.

12 THE COURT: That is part of the process,
13 though, as well that any death penalty is an automatic
14 review by the Arizona Supreme Court.

15 MR. BUTNER: I understand that, Judge.

16 THE COURT: You are not the only decision
17 maker when it comes to seeking the death penalty. My
18 understanding is that those decisions are made by more
19 than one person in your office. It's made by the assigned
20 prosecutor in conjunction, though, with the county
21 attorney and possibly other senior attorneys in the
22 office.

23 MR. BUTNER: That is entirely correct.

24 THE COURT: Is it the position now that we are
25 so much longer down the road and in the case that there

1 has been or is going to be any review of the request for
2 the death penalty in this case?

3 MR. BUTNER: That's a good question, Judge.
4 From my point of view professionally that's an ongoing
5 process. I hesitate at this point in time to speak for
6 anybody else besides myself.

7 THE COURT: I understand. All right. Thank
8 you.

9 Mr. Hammond.

10 MR. HAMMOND: Your Honor, before I respond to
11 the other remarks of Mr. Butner and the State, and I very
12 much appreciate what they had to say this afternoon. The
13 phrase ongoing process is, I would suggest, an important
14 phrase.

15 One of the problems across America that we
16 have encountered with the death penalty is that often
17 prosecutors, and this is certainly not just true of
18 Yavapai County, this is true in every place that has the
19 death penalty, prosecutors often make the initial decision
20 to charge a case as a capital case necessarily early on in
21 the process, and as a consequence of that, the prosecutor
22 doesn't have all of the evidence. Doesn't have the
23 benefit of what has been laid out in this Courtroom and in
24 the pleadings over the last now many, many months.

25 And, yet, we continue to say at least as a

1 theoretical matter that the whole process is designed to
2 identify those people for whom the death penalty is
3 appropriate, to be distinguished from the larger
4 population of people for whom it is not the appropriate
5 punishment.

6 The entire system pokes fun. It's based upon
7 the idea that we can do that and that's one of the
8 functions that we ask Judges and juries to do, but it's
9 also part of the function of the State and as the State
10 gets additional information both about guilt and innocence
11 and about the appropriate punishment, I think that all of
12 us hope that the State continues to weigh and consider
13 those things and does regard them as an ongoing process.

14 Timothy Ring. I think it's probably important
15 that we clarify exactly what it is that we have asked in
16 this motion. Timothy Ring in my law firm is a household
17 phrase. You will not find a lawyer alive at Osborn
18 Maledon in 1999, 2000, 2001, or 2002 who doesn't know that
19 name.

20 Most of them don't think of that name
21 lovingly because it wound up costing our law firm what
22 must have been a couple of million dollars in lawyer time.
23 It did rid of us Andy Hurwitz which, I guess, was a
24 positive contribution, but Andy Hurwitz and I and a large
25 group of other people spent an obscene amount of time

1 litigating the question whether these kinds of fact
2 finding judgments ought to be made by Judges or juries.

3 We prevailed. The Court agreed with the
4 arguments that we made by a six to three vote. The Court
5 concluded that questions of fact with respect to the
6 appropriate sentence had to be made by a jury and not by
7 the Court. And I do not retreat from that. I do not
8 claim that Ring was wrongly decided and I do not want to
9 stand in any Court in the State of Arizona and contemplate
10 the possibility that I could say we made a mistake because
11 on this issue as a constitutional matter we did not.

12 If there is going to have to be a judgment on
13 issues of fact under our constitution those questions of
14 fact have to be decided by a jury, and I would not argue
15 that we should simply remove the jury from the process but
16 at the same time I think we have to recognize the reality
17 and the reality is very nicely incapsulated in the capital
18 jury project.

19 So what we have proposed and what has been
20 proposed else where, this is not the most original
21 thinking of all time, was that there had to be at least
22 two juries, that there has to be a way for the jury
23 deciding these important questions with respect to
24 sentencing not to be tainted when they're trying the basic
25 questions of guilt or innocence, and thankfully one of the

1 great things that came out of Ring was that we had a whole
2 bucket load of sentencing evidentiary hearings in front of
3 juries, where those jurors started out not knowing
4 anything about the guilt and innocent side of the case.

5 We had 20 something cases that were remanded
6 after Ring. The Arizona statute itself contemplates that
7 there may be circumstances under which a new jury would be
8 impaneled and would have to essentially start over on
9 sentencing without knowing anything about what happened at
10 guilt or innocence.

11 So the basic concept of having a separate
12 jury do this is not something that we have not had
13 experience with. It's not something that people have a
14 difficult, envisioning and it is something that we think
15 would improve the system, and if anything might help
16 render it constitutional something like this might.

17 The question of about whether jurors can
18 decide, as the State says, whether a crime is heinous or
19 depraved is, I suspect, maybe the most obvious of the
20 problems. I don't believe there is a single person in
21 this courtroom today, nor have I seen anyone in this
22 courtroom in the last many months that we have been here,
23 who doesn't find this homicide at some level personally
24 horrifying. I have not heard a person say that.

25 I don't think there is a person who believes

1 that you can yawn at a homicide of this type and say it's
2 not despicable. It's not, pick your word, vile, heinous
3 or depraved, but that is decidedly not what the law
4 requires. If that's all the law required, than a huge
5 swap of all homicides would be death penalty cases and
6 people would go to death row every time there was a
7 homicide that could be so described and it's for that
8 reason that Courts of the United States Supreme Court
9 level and Arizona have emphasized over and over again that
10 it has to be especially cruel, heinous, or depraved.

11 Well, I defy, Your Honor, any one to explain
12 to us how a jury is to figure out whether a crime is
13 especially heinous particularly when the Defendant and the
14 Defendant's witnesses and God knows the Defendant's
15 lawyers are going to be saying this is a horrible crime.

16 So to suggest that we are demeaning jury
17 service or that we disrespect the people of the State of
18 Arizona because we think they cannot do it, they cannot
19 distinguish who should live and who should die, I think
20 brings the utter reality of this process.

21 And, Your Honor, let me close with this, every
22 time I see one of these cases I am brought back to the
23 careers of Judges and justices who have had to deal with
24 these cases over and over and over again. And eventually
25 a great many of those Judges begin to realize often too

1 late in their lives that this system just doesn't work the
2 way we like to say in theory that it does.

3 And it was that reality that I think we all
4 know caused Harry Blackman to eventually conclude that he
5 would no longer tinker with the machinery of death and he
6 stopped. And it caused Lewis F. Powell, Junior, after he
7 retired from 16 years on the Supreme Court to conclude
8 that no death penalty case he had been involved in in
9 which he had found death had been properly decided.

10 Well, this Court may have its hand's full
11 being asked to make decisions of this type and today we're
12 not asking you to say that forever and for all time this
13 Court will not find itself required to tinker with the
14 machinery of death but we ask at least this, that the
15 Court recognize that if there is a way to do a trial that
16 reduces the risk of really vile wrongness by our Court
17 system, we ought to do it and it's with that spirit that
18 we filed this motion. Thank you and thank the State of
19 Arizona.

20 THE COURT: Thank you, Mr. Hammond. The key
21 points that the Court is being asked to do is declare
22 death qualification of the jury unconstitutional and if
23 not -- well, I suppose that it's generally the nature of
24 that as part of that request at least in the alternative
25 to have a second grand jury or a second jury -- excuse me

1 -- I agree with the Mr. Butner about the eloquence and
2 passion with which Mr. Sears and Mr. Hammond and
3 Ms. Chapman approached this issue and the efforts of
4 Mr. Hammond's firm and others in the State that are
5 bothered by the level of due process that is provided in
6 cases where the punishment is the most significant that
7 can be enacted.

8 I do find the studies, even though they are
9 now somewhat more dated and deal with juries and states
10 other than Arizona, they are still disturbing. They are
11 still enlightening. My question of Mr. Butner with regard
12 to whether the death penalty is still something that will
13 be sought in this particular case and his response, I
14 think, are pertinent.

15 I totally agree it's an ongoing process and I
16 hope that it's an ongoing process. It must need to be an
17 ongoing process. I think it's an ethical, moral, and
18 legal imperative to keep brief reviewing at all stages of
19 the proceeding whether or not the most significant penalty
20 in the law is appropriate.

21 My observation, obviously, is that Arizona has
22 adopted the death penalty as a punishment. Some states
23 have done away with it. Some states have established
24 moratorium on the death penalty and various governors have
25 done that in Illinois and most recently I think New

1 Mexico.

2 Arizona has decided to have the death penalty.
3 Arizona has no requirement at this time with a second jury
4 constitutionally and I agree with both Mr. Butner and
5 Mr. Hammond, that the juries, the appropriate part of your
6 group to make a determination about the death penalty is
7 distinguished from the Judge, but, I guess, I also think
8 that it's necessary and it is an element of the death
9 penalty capital juris prudence in Arizona and nationally
10 that there is a review of what juries do to make sure that
11 mistakes are not made.

12 And in Arizona the Supreme Court automatically
13 reviews the propriety of the death penalty to ascertain as
14 best it can whether the death penalty is appropriate under
15 all of the circumstances aggravating or mitigating and I
16 suppose in some degree of disagreement, although perhaps
17 not on specific cases, whether that should be the
18 situation.

19 So with that preliminary commentary I hope
20 that the State continues to review its decision with
21 regard to whether the death penalty is appropriate for
22 this particular case, but I am going to deny the motion to
23 declare the death qualification of the jury
24 unconstitutional and I'm going to deny the request for a
25 second jury in this particular case but I appreciate the

1 studies.

2 I appreciate being provided in advance with
3 the materials that I could review them before we got to
4 this week and I did so. We're going to take a brief recess
5 at this point. We will resume in about 10 minutes.

6 (Whereupon a break was taken.)

7 THE COURT: Let the record reflect the
8 presence of all counsel and Defendant. Mr. Sears.

9 MR. SEARS: Judge, if we could go back and
10 pick up the analysis of the draft jury questionnaire, I
11 think that would be a good place to start now.

12 And what I have here are the red line versions
13 that the State submitted yesterday afternoon late and the
14 red line version that we submitted separately and I think
15 with the possibility of one exception we're in agreement
16 with the comments of the Court about Questions 1 through
17 71 leading up to the death penalty questions, with a
18 possible exception, I believe, it's Number 17, dealing
19 with race.

20 And if could just add something to the
21 discussion yesterday about that and I want to reiterate
22 the point that I tried to make perhaps a bit clumsily,
23 that the last thing in the world the defense wants anyone
24 to think about our position is that we're somehow looking
25 to make jury selection decisions based on racial

1 stereotypes and we're desperate to know the racial makeup
2 of the jury.

3 That is the furthest thing from our process
4 that we can think of, but having said that unless -- it's
5 been my experience today particularly in this age of
6 diverse and multiculturalism that unless an individual
7 juror self-declares their racial own identity, we are
8 often put in a position when we get to actual Voir Dire
9 with jurors in our presence sadly of trying to guess about
10 their racial identity.

11 And you shouldn't make assumptions based on
12 physical appearance or names or anything about employment
13 or anything else. The easiest and most straightforward
14 way, I would think, to get that information out so that
15 going forward we would have some baseline information
16 would be to politely ask in a much larger context people
17 to self-identify their racial identity.

18 And although I see that the jury questionnaire
19 that we use here that you obtained for us doesn't ask
20 people to do that. I still can think of any number of
21 places in everyone's common experience where that happens,
22 from driver's licenses to personally every kind of
23 application I can think of to apply for different kinds of
24 things. Sometimes it's voluntary. Sometimes it's not.

25 If the Court wants to strike a middle ground

1 so as to remain respectful of people, if we put the
2 question in a voluntary way, offers the jury an
3 opportunity to decline to answer that question. I
4 personally would not be offended by that process but on
5 balance I think that it might be part of what we need to
6 know in this case.

7 And I think that we tend sometimes to think of
8 Batson in a very simplicit way as only applying to
9 minority Defendants and clearly identifiable members of
10 the same minority group being struck from jury panels but
11 Batson can get more complicated and more involved than
12 that.

13 And I actually read an article one time that I
14 didn't quite understand it but it talked about reverse
15 Batson and I'm sure there is such a thing. Somebody's
16 written about it, but it seems to me that it is possible
17 in this case that there could be a problem with the
18 composition of the jury based on all kinds of racial and
19 ethnic mixes in the jury panel and there's no secret to
20 this because it's true and it's part of the process, that
21 bias of all kinds, whether it's identified by famous
22 judges or other people, is what both sides in a jury
23 selection process we're trying to get. We're trying to
24 identify jurors who bring some bias to the process and it
25 can be bias about all kinds of things.

1 It can be bias about the kind of person that
2 they perceive the Defendant to be or the lawyers or the
3 Judge or the nature of the crime or the socioeconomic
4 status of somebody in the case where the lack thereof or
5 the police one way or the other but that's what the jury
6 selection process in large part is designed to try to
7 ferret out and sadly even in 2010 racial bias exists.

8 We can't look away from it. We know that it
9 exists and it exists around us. What we don't always know
10 is how it will manifest itself in this case but simply
11 because we have a white Defendant doesn't mean that bias
12 could be assumed not to be a factor in this case.

13 So that's all I have to say and I will leave
14 it to the Court's good judgment what to do but if the
15 Court would be more comfortable with making that
16 particular question somehow voluntary on the part of
17 filling out the questionnaire, I know that all of us have
18 seen those kinds of applications too, and I don't --
19 that's a private matter and I know how I answer those
20 questions but I don't presume to know or care much how
21 other people answer those questions. So that's what I
22 have to say and I think it's Question 17.

23 THE COURT: It is.

24 MR. SEARS: Thank you. But moving ahead if we
25 could talk a minute about Questions 73 through 95 which

1 are the questions dealing with the proper penalty in this
2 case.

3 MR. BUTNER: Judge, before we move ahead, I
4 think that in regard to Question 17 it just invites Batson
5 error to have that question there. It's a focus on race
6 and ethnicity and we should not be doing that when we are
7 picking a jury and, in essence, that's what Batson stands
8 for.

9 THE COURT: I understand.

10 MR. BUTNER: Thank you.

11 THE COURT: Thank you. Onto the penalty type
12 questions.

13 MR. SEARS: Yes. Starting with 73 and I am
14 looking at -- on the screen our red lined version which
15 still has the text as we proposed of 73. This is my
16 observation about the State's proposal. Let me take a
17 second here to jump over to that.

18 The State's proposal, if you look at their red
19 line version, I think is more legalistic in its wording,
20 that's a general observation. We were trying to -- even
21 though we were using more words, we were trying to use a
22 vernacular and a vocabulary that we thought would be more
23 familiar to jurors and I'm jumping around here. It's
24 going to take me one second. I'm almost there.

25 And the language that the State has struck

1 from 73, and talking about the automatic death penalty is
2 something Mr. Hammond was talking about in broad terms and
3 is something is that we have said is an important issue in
4 this case.

5 There will be, I'm certain, in the
6 questionnaires people who -- the shorthand for them -- are
7 automatic killers. People who will answer a number of
8 these related questions in the same way that will indicate
9 that they believe that mitigation and all of the other due
10 process that surrounds the penalty phase and the
11 intermediate phase is meaningless to them. You commit a
12 particular crime -- it could be as simple as any crime as
13 first degree murder produces the death penalty. We will
14 see, I'm almost sure, somewhere in the questionnaire
15 someone will write the words an eye for an eye. That is a
16 belief which is in the air today and we will see that.

17 It seems to us appropriate not only to ask
18 jurors about that but to remind jurors that that is not
19 the law and if the jurors are simultaneously reminded that
20 that is not the law and ask if they think it is and they
21 still persist and ask if they think it is, that would be
22 an example, I submit, of a juror that could be excused on
23 the questionnaire.

24 And so we think that it's important to have
25 the cautionary language in 73 there together with the

1 language about, how we get to a penalty phase that we have
2 proposed. And the problem in general terms is the State's
3 proposal, while being an accurate description of the law,
4 is full of terms that we tried, through the motion
5 Mr. Hammond argued today, to demonstrate that empirically
6 confused jurors can produce early decision making which is
7 a very serious problem and one that we think the study --
8 we still think the study show exists and takes place all
9 the time.

10 So what we're trying to do here is, put
11 simply, is to structure these questions beginning with
12 Question 73 in a way that emphasizes to the jury to wait
13 to make the decision, that the decision has to be based on
14 something more than just what Defendant was convicted, and
15 that the decision has to consider on some level
16 aggravating and mitigating circumstances applicable to the
17 Defendant in this case and it weeds that out.

18 So we think that -- even though it's a bit
19 wordy we think that the language in our 73 really clouds
20 the baseline presumption of a light verdict that we think
21 is the law in Arizona. The presumption is that absent a
22 finding of aggravating factors and absent an appropriately
23 timed decision by the jury to properly weigh aggravation
24 versus mitigation to find aggravation propounding the
25 presumption going in is a light verdict. That's true.

1 And I don't think that the State could
2 seriously argue otherwise because it's true it bears
3 repeating to the jury because it is part of this process
4 of the jury coming to understand how this all works and if
5 you believe or at least suspect the jurors don't
6 understand this or even if they understand it don't
7 observe it then it would make good sense to me to
8 emphasize it and to do whatever we could whenever we can
9 to emphasize how this is suppose to work. How the United
10 States Supreme Court thought in Gregg and Furman and the
11 other cases decided after that this would work in this
12 case.

13 So that's where we are on 73. Your Honor.
14 If you want me to stop, I can stop and go question by
15 question and let the State go or I can speak all the way
16 through. It's all pretty much of a piece here.

17 THE COURT: Any references in how we'll pursue
18 this, Mr. Butner, do you want to go question by question?
19 Do you want to just let Mr. Sears make his pitch and then
20 you make yours?

21 MR. BUTNER: Probably would be better if we
22 went question by question, Judge, I think.

23 THE COURT: Go ahead.

24 MR. BUTNER: Okay. In regards to 73, first of
25 all, I think that the way that it's written by the defense

1 it's not neutral language but rather it's suggestive and
2 argumentative. It's the use of connotative language
3 rather than denotative language. Mr. Sears calls that
4 legalistic.

5 I wouldn't say that it's legalistic but rather
6 it is the usage of very neutral language that was the
7 effort on my part was to choose neutral language, that was
8 clear, and that's why I indicated at the bottom, you know,
9 follow the Court's instruction that the Defendant is
10 presumed to receive a life sentence, that's the last
11 portion of that instruction.

12 That makes it clear to the jurors that, in
13 essence, if they enter into the penalty phase of the trial
14 at that point in time it's more or less along the same
15 lines of when they entered into the first portion of the
16 trial.

17 The Defendant had a presumption of innocence
18 at that point in time. The Defendant in the penalty phase
19 now has a presumption that he's going to receive a life
20 sentence, and it makes it clear in the language that we
21 inserted that they need to -- that they have the burden --
22 or rather the prosecution has the burden of proving beyond
23 a reasonable doubt that there is at least one aggravating
24 factor which would only allow them to consider death.

25 I mean, I just think that the suggested

1 instruction by the State is simpler. It's less confusing.
2 It's less vague and ambiguous. It's less suggestive.
3 It's more clear for the jurors to understand and I think
4 that it's appropriate that way.

5 I guess, basically that's why sometimes we end
6 up with the, you know, somewhat legalistic sounding
7 instructions because we're striving to be abundantly clear
8 and I think that the suggestion instruction as submitted
9 by the State is abundantly more clear than the rambling
10 and suggested instruction submitted by the defense.

11 THE COURT: In context of yours, do you have
12 any strong objection to advising the jury as part of a
13 second sentence that the death penalty doesn't
14 automatically result from a conviction?

15 MR. BUTNER: I don't have any objection to
16 that. That's the gist of that instruction too.

17 THE COURT: I think that I would put that back
18 in of what you scratched. Just so that it's emphasized.
19 I think that's keeping with some of the social science
20 studies that were referred to by Mr. Hammond.

21 MR. BUTNER: Sure. I don't want the jurors to
22 be thinking that when we enter, if we enter, into the
23 penalty phase.

24 THE COURT: All right. 74, Mr. Sears.

25 MR. SEARS: Let me just take a second here.

1 This is another example of a point that Mr. Hammond was
2 making earlier this afternoon, Your Honor, and in which I
3 thought Mr. Butner took too far in the wrong direction by
4 talking about the role of the jurors in determining that
5 somebody is guilty or innocent.

6 What we think that the studies show is that
7 the signal factor time against time that causes jurors, as
8 Mr. Hammond said, to vote for death is how the murder is
9 committed to a certain extent, who it is that's murdered
10 in the case.

11 And I think that this revision still keeps
12 the jurors rooted back in the guilt phase and doesn't do
13 enough to show the separation between the two phases. I
14 think that you can see the continuing theme that we're
15 advancing here, Your Honor, but that's a particular
16 problem in our unique post-Ring structure here with the
17 intermediate phase and then the penalty phase particularly
18 when the State as they have in this case announces that
19 they are not going to put on new evidence, they're just
20 simply going to rely on trial evidence to get them to the
21 third phase and to a certain extent to constitute
22 aggravating information.

23 It keeps the jurors rooted back in the trial
24 phase. The point of -- much of what we say in this
25 questionnaire is that the way in which jurors are suppose

1 to approach the penalty phase is to essentially put aside
2 the way in which they convicted the Defendant of the death
3 penalty crime and focus on the penalty phase issues,
4 aggravation which is limited by law and by your rulings
5 already in this case, and mitigation, and understand to be
6 open to -- and tell us going in that they will be open to
7 mitigation and will wait until they heard the aggravation
8 and mitigation before they decide this.

9 If you look at the way that 74 winds up with
10 the State red lining in this case by taking out, it's not
11 the crime itself, adding back in, the facts of the crime
12 may be considered and whether those facts -- this
13 instruction as written in our view undoes the efforts that
14 should be made to explain to the jurors and to get the
15 jurors to acknowledge and agree that penalty is separate
16 from the guilt phrase.

17 So I think that jurors can consider this same
18 evidence but they have to be clear, which this instruction
19 doesn't, or this question doesn't help them in that area.
20 That evidence is now going to be used for a different
21 purpose. It's not -- the fact that they used it to
22 convict the Defendant is different from the purpose that
23 they would use that same evidence in this process.

24 So going back to our language if you just
25 take out the State's red line there, I think is a clearer

1 more accurate description and it is -- this is an
2 attitudinal question. All of these capital questions, 73
3 to the end, are seeking attitudes from people and this is
4 another way to ask jurors in advance of in-person Voir
5 Dire about whether or not they have some belief that you
6 convict somebody of a certain crime that's going to get
7 the death penalty every time, I don't care what you show
8 me, and that's where we are with 74, Your Honor.

9 THE COURT: Mr. Butner.

10 MR. SEARS: Your Honor, I don't think that the
11 suggested instruction by the defense clearly states where
12 the jury is at that point in time and what I mean by that
13 is in reading that instruction it tends -- I think it
14 tends to confuse them when you say, though, the crime may
15 be considered, that's not really accurate, and that's why
16 I focused on the fact that the facts of the crime may be
17 considered because they've already made a determination at
18 that point in time that the Defendant is guilty of the
19 crime.

20 They're not really considering the crime.
21 They're considering the specific facts of this specific
22 crime. In other words, the facts of the crime as to
23 whether those facts prove an aggravating factor, and so to
24 clarify that I thought it was more simple and more
25 understandable to tell the jury the facts of the crime may

1 be considered and whether those facts prove the existence
2 of aggravating factors, but -- and then go on to clarify
3 the prosecution must prove beyond a reasonable doubt the
4 aggravating factors that make the Defendant eligible for
5 death.

6 I don't see that that is clearly expressed
7 but, rather, I see that as being muddled in the defense
8 instruction. We're not talking about the crime itself.
9 We're talking about the facts of that particular crime,
10 whether it is especially heinous or especially depraved as
11 discussed earlier, and so I think that we need to focus on
12 the facts of the crime rather than the crime itself.

13 MR. SEARS: Your Honor, if I have could just
14 add briefly one additional point?

15 THE COURT: Sure.

16 MR. SEARS: If you remember what we're trying
17 to do here with this questionnaire is we're trying to seek
18 out in advance from potential jurors attitudes about the
19 death penalty and the death penalty process which are
20 problematic and this -- the question the way we drafted it
21 is seeking a particular attitude which is -- which is
22 another way if somebody does some particular crime whether
23 it's, you know, just the generic first degree murder or
24 killing a female or killing a female in a particular way
25 or killing a particular female in a particular way, would

1 that person automatically vote for death. That's the
2 attitude we're seeking here.

3 So the way that question is here is an
4 absolutely pretty simple statement of that proposition,
5 that it's not the crime itself, that you don't
6 automatically vote for death and you may not automatically
7 vote for death on the crime. You have to separate that
8 out and listen to the aggravating factors.

9 To add back in there this complex notion that
10 the aggravating factors can then themselves be elements of
11 the crime is the dog chasing its own tail. I think, what
12 we're looking for is a discreet identifiable bias that's
13 improper that if you ask a pretty simple question, you
14 could produce a simple answer.

15 Somebody will say, yep, murder, rape of a
16 child, torture, there are lots of things that people can
17 think of that would fit in this question. That's what
18 we're trying to get at with this. We're not trying to
19 give them a jury instruction at the beginning of the case
20 about how the case goes. We're just looking for an
21 attitude.

22 THE COURT: Why do you have three boxes?

23 MR. SEARS: Because we get some, do not
24 understand on these.

25 THE COURT: The question itself says, do you

1 understand that.

2 MR. SEARS: Oh, well, I guess I didn't
3 understand my own question. I would check I do not
4 understand probably in every one of these. I think you're
5 right. It think it would be yes or no.

6 THE COURT: On that one?

7 MR. SEARS: Yeah.

8 THE COURT: Thank you. 75.

9 MR. SEARS: Thank you, Your Honor.

10 THE COURT: Let me ask, Mr. Butner, I'm not
11 clear on yours. What do you think of 75? Any problem
12 with that? I'm not sure what the mark there means.

13 MR. BUTNER: We just added a comma.

14 THE COURT: Oh, okay.

15 MR. SEARS: I object. It should be a
16 semicolon.

17 THE COURT: You all are in agreement?

18 MR. SEARS: I think so.

19 THE COURT: Naturally.

20 MR. SEARS: And I don't see -- I'm sorry. Go
21 ahead.

22 MR. BUTNER: Understand, Judge, we're in
23 agreement. If we end up with this whole bunch of
24 questions, specifically, we're in agreement about that
25 question specifically, but we don't think that it's

1 appropriate to make this broad range of inquiry into the
2 death penalty.

3 THE COURT: I understand that was your general
4 thought.

5 MR. BUTNER: I thought so.

6 MR. SEARS: Judge, I don't see any specific
7 red lining from the State after we get down to 81 and we
8 don't have --

9 THE COURT: Down to 81?

10 MR. SEARS: I think we're okay with the
11 suggested changes. I think that improves the question a
12 little bit.

13 THE COURT: Okay. Thank you.

14 MR. SEARS: And then I don't see another --
15 let me make sure.

16 THE COURT: 84.

17 MR. SEARS: I think we get up to 84. 84 is a
18 very important question. This is -- in our collective
19 experience and we cross-checked this with Mr. Rostoferro
20 (phonetic) and he comes back and tells us that this is his
21 particular view, and tells us that in a case of Mojave
22 County that he worked on that just went to trial in the
23 last month or so, that a colleague of ours was involved
24 in, the trial Judge in that case Judge Wise struck jurors
25 based on their answer to this question without bringing

1 them to Court.

2 He saw this as a real barometer question and
3 if it's out -- if the State's objection is the objection
4 that they sort of been making here all along that they
5 don't think it's appropriate or even lawful to strike any
6 one based entirely on their answers to the questionnaire,
7 then we'll have to, you know, we'll have to ask you to
8 decide whether that's possible but if that were going to
9 happen, and we think that it can and should and would in
10 this case with your permission, this question above all
11 other ones is the one that directly asks jurors for
12 attitude and a bias.

13 THE COURT: Mr. Butner, is it the particular
14 language in this question or what's the issue from your
15 point of view?

16 MR. BUTNER: Well, the issue, Judge, is that
17 it over simplifies the situation and puts the potential
18 jurors in a box. It crystalizes their attitudes. It's
19 duplicative. All of those kinds of things. I just don't
20 think that -- I don't think that this is an appropriate
21 question for the jurors.

22 MR. SEARS: Judge, I will simply respond by, I
23 think it is the most appropriate question perhaps for the
24 jurors because this is -- the way that this is structured
25 is in general terms the range of opinions on the death

1 penalty. The only ones that are missing are, I have no
2 opinion to the death penalty, but people to express an
3 opinion, we think this question represents in logical
4 sequence the range of opinions from, I would never vote
5 for death to, I would always vote for death, and then the
6 middle ground with shading in either direction.

7 THE COURT: Why don't you just throw in a no
8 opinion then.

9 MR. SEARS: Well --

10 MR. BUTNER: Judge, just -- and I refer you
11 back to Question Number 79 which says in what types of
12 cases do you think the death penalty should be imposed.
13 You give the veiner men at that point in time to tell
14 you. Maybe they'll say none, not any kinds of cases. I
15 mean, it sort of -- you could add to that question, in
16 fact, if any.

17 MR. SEARS: Let me tell you what our
18 experience is with those kinds of questions and one of the
19 points we've always --

20 THE COURT: What, 79?

21 MR. SEARS: 79 and 84, Your Honor, both have
22 some of the same attributes from our perspective. One of
23 the goals that I think that the Court has come to agree on
24 is to expedite the process, not asking these questions now
25 means, in essence, they would have to be asked in Voir

1 Dire. So we ask the question now. We get the answers.
2 It speeds up the process. The question becomes targeted
3 and focused.

4 The -- 79 is a question or some version of
5 that that in every questionnaire that I can think of that
6 I been involved with is answered and you get a very
7 similar answer and what it typically involves is that
8 jurors who express some doubts about -- reservations about
9 the death penalty but then on questioning by the
10 prosecution start thinking about kinds of cases and they
11 start mentioning names and it's really just a matter of
12 America history.

13 It used to be Ted Bundy and Manson and then it
14 was Jeffrey Dahmer and then time moved on and it was
15 something else and then it became Timothy McVeigh and now
16 it might be Osama bin Laden and that's what I think we're
17 going to see.

18 I would be willing to wager that we'll get
19 answers to 79 that would either mention people by name. I
20 think it's quite likely and/or we will mention certain
21 types of crimes, mass murder, murder of a child.

22 THE COURT: Or none. Do you think that you
23 want to add, if any?

24 MR. SEARS: Mr. Hammond.

25 MR. HAMMOND: The problem with giving them the

1 choose of none is that it -- at least the people who write
2 this -- who wrote this question were really trying to get
3 the jurors to focus on finding of intentional and
4 premeditated murder and putting yourself in the situation
5 of being someone who has found murder to have been
6 intentional and premeditated.

7 If you give people the option of having -- if
8 by none you mean no opinion at all, you give people an
9 opportunity not to have to think hard about this question.
10 So I think that you rob it of some of its power. There is
11 -- there's nothing here that prevents a juror from looking
12 at all of these five boxes and saying I'm not comfortable
13 with any of them. Someone can write that in but to give
14 them an option, at least I think, the experience has been
15 causes people to deflect from addressing the hard
16 question.

17 THE COURT: Thank you. I think that I have
18 the insights by both. Let's get to 85.

19 MR. SEARS: I think, Judge, that -- let me
20 just take another -- oh, let me look at 85. I don't
21 really have a problem with the State's revision of 85,
22 except I don't think the words, do not matter, got in and
23 crossed out. I don't know whether that came out of ours.
24 I'm a little confused. Do you see where I'm talking
25 about? At the end of their version of 85? They have --

1 just have the phrase do not matter and then have that red
2 lined out.

3 THE COURT: Yes. I'm not sure. I see where
4 you are but --

5 MR. SEARS: It's --

6 THE COURT: I don't know where it came from.
7 Oh, I see.

8 MR. SEARS: I guess, they're doing -- we have
9 in our 85 their background and circumstances of the crime
10 do not matter and their 85 -- I don't really have a
11 problem if it would result in no further discussions. At
12 this point we could accept the State's version of 85 as
13 written.

14 THE COURT: Okay. Thank you. 86.

15 MR. SEARS: 86 is -- if eliminated, which I
16 think is the State's position -- 86 --

17 MR. BUTNER: It is.

18 MR. SEARS: -- if eliminated all together
19 then, again, that's another question that we would have to
20 ask in follow-up if somebody back up in 85 checks the
21 disagree box. If they say that they disagree and they are
22 not willing to listen to -- as Mr. Hammond said, in a
23 premeditated murder case they are not listening to
24 childhood evidence or background or circumstances of the
25 crime, eliminating 86 somehow validates that process.

1 If you leave it in we get more information
2 about the juror because they just said, in essence,
3 there's a big hunk of mitigation that they are not willing
4 to consider, so then 86 is a logical follow-up to that
5 question. Saying, wait, a minute, the law says that the
6 jury is suppose to consider these things and is there
7 something else that you won't consider.

8 And I think that we will be surprised, maybe
9 and maybe not surprised, but we will see for sure
10 questionnaire answers that will say that I don't want to
11 hear anything about the Defendant's sad childhood or
12 substance abuse or, you know, something like that, that's
13 an attitude that is becoming out there in the air now.
14 It's an important issue. It's attitude and a bias. Those
15 two questions paired together are designed to look for
16 that and then ask about it and then ask an open-ended
17 question, is there anything else that you wouldn't
18 consider.

19 And one of the things that we have noticed
20 overtime is that there is a hardening, and that's the way
21 we look at it, the State may have a completely different
22 way of looking at it -- -we see a hardening of people's
23 attitudes about what used to be explanations and instead
24 they are now being called excuses and we don't like
25 excuses and don't give us any excuses. And that's an

1 attitudinal bias that's important to understand that it
2 exists there and these questions take us in that
3 direction, you know, if somebody tries to explain
4 themselves, are you going to be irritated with them
5 because they are just making an excuse.

6 THE COURT: Mr. Butner.

7 MR. SEARS: So that's where we are in 86, Your
8 Honor.

9 MR. BUTNER: The reason that I don't like that
10 question, Judge, on behalf of the State is because it just
11 -- and, I guess, this is why the defense wants it -- is
12 because it just asks the jurors basically to speculate
13 about anything that they can think of that they might not
14 like to consider. And maybe that is what they want but I
15 just don't think that is an appropriate question to use to
16 screen a prospective juror. Can you think of anything
17 under the sun, in essence, that you would not want to
18 consider in regard to the death penalty. I don't know.
19 That's kind of the way that I read that. It's kind of
20 strange.

21 MR. SEARS: We would simply add that
22 Mr. Butner is right that we do want the jurors to be
23 thinking about and putting down in a questionnaire things
24 that come to mind. That's exactly what we 're looking
25 for. This is not a process designed to put down or limit

1 the amount of information. We think it's designed to make
2 to encourage people to think about things and say things
3 and put out their thoughts and feelings and that's the
4 kind of open-ended question that might produce that
5 result.

6 People may say, no, but some people I suspect
7 will answer that question honestly and say, yeah, I have,
8 you know, if somebody does a particular crime, I do not --
9 you know, don't waste your time arguing this to me.

10 THE COURT: Let me break the pattern and ask
11 Mr. Butner to comment on 87.

12 MR. BUTNER: On 87. Oh, okay.

13 THE COURT: You scratched it entirely, I
14 think.

15 MR. BUTNER: Right. I thought that the way
16 the question was written that it was not an accurate
17 statement of the law. It was confusing and vague and
18 ambiguous. I thought that when deliberating in the
19 sentencing phase of the trial that they should be
20 considering evidence and arriving at whether there were
21 factors. And so I felt that this was not an accurate
22 statement and as a result I don't see how they could.
23 Also, I didn't think that the way it was written, I didn't
24 think they could understand the concept. I didn't think
25 it was an accurate statement of what the law was.

1 They should be considering evidence to
2 determine if there are mitigating factors present or
3 aggravating factors present in the sentencing phase. I
4 mean, we focus on evidence.

5 THE COURT: Mr. Sears.

6 MR. SEARS: Well, I do think that it is the
7 law in Arizona that the jurors are free to consider what
8 they believe to be mitigating factors even though they may
9 not be specifically identified and argued by the defense
10 in the case.

11 I would agree with Mr. Butner to the very
12 limited extent that they are not going to be instructed
13 that they can just make up some fact that is not supported
14 by the evidence, that, you know, he looks like a nice
15 person, he must be good to his mother. There's been no
16 evidence of that but they -- the jurors would be free to
17 craft their own.

18 We're going to ask for special verdict forms
19 that would allow the jurors as to add mitigating factors
20 that they believe exist in this case, but this is an
21 interesting exercise because if we get a significant
22 number of jurors who say they are confused by this because
23 the question is, do you understand this. If we get an
24 awful lot of people saying no. If nothing else, that
25 gives us a pretty good idea of what kind of jury

1 instructions we're going to need to explain this important
2 concept to the jurors if we ever get to that place in the
3 case.

4 If we know going in that the majority of
5 jurors just don't get this and they don't understand
6 mitigation and from our perspective we're focusing on the
7 mitigation part of this case. We want to be sure that
8 jurors understand mitigation and how it works and what it
9 is before they're seated in this case.

10 THE COURT: You don't say mitigation in here.
11 How do you feel about something along the lines of, each
12 juror is allowed by law to consider evidence of the
13 mitigating factors even if not argued or mentioned by the
14 lawyers.

15 MR. SEARS: That's much better. That's much
16 better. That's what we meant to say, Your Honor.

17 THE COURT: Next, there are some differences
18 in 88.

19 MR. SEARS: We're okay with the State's
20 revision to 88. I don't have a particular problem with
21 that.

22 THE COURT: How do you feel about this
23 concept?

24 MR. BUTNER: State strikes that.

25 THE COURT: What's your --

1 MR. SEARS: Could I ask you -- well, again
2 we're looking for attitudes and, you know, asking people
3 in this limited context in a questionnaire where the whole
4 purpose is to get people thinking about and writing about
5 their feelings and beliefs, asking somebody straight up
6 how they will feel about something, I think is a wonderful
7 way to find out.

8 Tap dancing around concepts and getting them
9 to say they agree, disagree, check the box yes or no or
10 asking them an open-ended question about, how do you feel
11 about this. I would go every time in the direction of --
12 in the context of the questionnaire trying to find out
13 about people before they set foot in the courtroom.

14 So I think it's an important add on to this
15 question and this is an important question about this and
16 it's also important -- by the way, I would put back -- and
17 I did say I was okay with 88, but I think that the word
18 mitigating maybe ought to be back in the draft.

19 I think the State has taken it out and I think
20 that your comments about putting back it in would probably
21 make sense. Looking at 88 now, but that's why 89 -- in
22 their 89, 89 is trying to get jurors to tell us early on
23 in the process what they think about this.

24 And I don't want to keep emphasizing the
25 negative responses but those are the ones that often stick

1 in my mind in questionnaire and there will be harsh answer
2 to lots of these kinds of questions and that's just, I
3 think, a reflection of the times that we will live in.

4 I used to think that it was a reaction to
5 9-11. I don't feel that way necessarily any more. I
6 don't think that's that way any more but times have
7 changed and the tenor and nature of responses to capital
8 jury questionnaires in my limited experience looking at
9 the ones in the cases that I've been involved in are
10 pretty tough.

11 THE COURT: 90, Mr. Butner, I'll start with
12 you on that.

13 MR. BUTNER: Calls for a pledge from the jury.
14 I don't think that's appropriate at all, Judge.

15 THE COURT: Mr. Sears.

16 MR. SEARS: Asking the jurors if they would be
17 willing to consider a sentence of life I don't think is
18 the same as asking them -- is extracting a promise from
19 them that they will vote for life. We're just asking if
20 they will do it and this brings up the point that I was
21 making earlier about differentiating mitigation from
22 excuses for their crime and emphasizing that mitigation is
23 related to punishment is not an excuse for the crime if
24 Defendant was convicted of a crime.

25 And if jurors answer this question in a

1 negative that they would not be willing to consider a
2 sentence of life, it's critically important to answer the
3 question. I just, with all due respect, as I said, I just
4 don't read this in any way as trying to extract a promise
5 for a particular vote. The question could be written that
6 way. It's just not.

7 THE COURT: Some got placed out of order. 91.
8 This is not dissimilar from your other multi-part
9 question?

10 MR. SEARS: I'm sorry. I'm looking for the
11 State's.

12 THE COURT: It's on the next page.

13 MR. SEARS: On the next page -- oh, I see.

14 THE COURT: Yeah. Well, maybe I ought to go
15 to Mr. Butner since he's strike the whole thing.

16 MR. BUTNER: Right. It tries to narrow the
17 jurors into one of those boxes. It's also duplicative and
18 I think that when it does that, in essence, elicits a
19 pledge from the juror. So I don't think that it's an
20 appropriate question at all. It's not a screening device.
21 It's rather a device that's designed to get them painted
22 into a corner.

23 THE COURT: Mr. Sears.

24 MR. SEARS: Apart from the fact that very much
25 like, I think, it was perhaps 84 that was structured the

1 same way simplifies and shortens the in-court Voir Dire,
2 this question is a little different because what we know
3 from our experience and what we think the capital jury
4 project and other studies show is that this is what jurors
5 don't understand.

6 They don't understand mitigation or
7 significant number sometimes in excess of 50 percent of
8 actually trial jurors don't understand what mitigation is,
9 what they're suppose to do with it, when they are suppose
10 to consider it, and the timing of it.

11 At a minimum structuring this question this
12 way requires them to look at this in a logical sequence.
13 Again, from a view that individual mitigating factors and
14 actual murder should determine the penalty down to
15 something else, it will help us understand, I believe,
16 which jurors don't understand mitigation, which jurors
17 don't get mitigation.

18 If they can't -- if they can't work their way
19 through this and their answer are, I don't know what this
20 is or uh or question mark or they check three or four
21 boxes, that's important identifying information in and of
22 itself. Sometimes even more important than what they
23 actually answered in the question because this is where we
24 think the post-Ring structure in Arizona has caused a real
25 problem in the real world from the 20 some Ring remand

1 trials.

2 What we think has happened as a result of
3 those is that this has just gotten so God awful
4 complicated when it's not. It's a pretty simple thing but
5 we get down into these multi-layered instructions and a
6 three part process and people's eyes just kind of get
7 crossed.

8 THE COURT: Well, the dichotomy that the
9 question implies, though, is the facts of the case versus
10 the mitigating circumstances.

11 MR. SEARS: Yeah.

12 THE COURT: As distinguished from the
13 aggravating circumstances which maybe may or may not be
14 inclusive of the facts of the case from -- as
15 distinguished from the mitigating circumstances.

16 MR. SEARS: In this particular -- unlike --
17 unlike the automatic killer questions -- I call them that
18 just because that's a shorthand -- this is a little
19 different because there are several answers in here that
20 could be appropriate that would allow jurors to serve.

21 It's not -- it's not an all or nothing
22 question but there are some answers here that we think are
23 improper answers or that at a minimum would direct us to
24 follow-up Voir Dire and then the crafting of jury
25 instructions in a way to structure in those people winding

1 up being seated, a way to structure the penalty phase to
2 focus in more clearly on this process. This is to us the
3 ultimate attitudinal question about mitigation.

4 THE COURT: You mean strongly in the last one?

5 MR. SEARS: I think so. I think so.

6 MR. BUTNER: Judge --

7 MR. SEARS: It's not stylistic particularly
8 consistent with the other questions. I'll give you that
9 but that's what we're looking for. That is an attitude
10 that we're looking for and some people may neither have a
11 strongly held belief. I just want to know about the
12 person. The crime is the crime and the sentencing and the
13 mitigation is something entirely different. That is a
14 particular attitude we're seeking to understand for
15 potential jurors.

16 THE COURT: You had something else,
17 Mr. Butner, on that?

18 MR. BUTNER: Judge, I just think that this
19 whole question is going to tend to confuse the jurors
20 greatly and you said it much better than I. They are
21 going to end up thinking, well, I mean, I'm looking at the
22 facts of the crime as a compared to the mitigating factors
23 and that's what I need to be look at when, of course,
24 that's not -- that's really not an accurate understanding
25 of the law. It's going to -- it's going to confuse the

1 jurors and by having them check little boxes, and they're
2 going to be in a category that really isn't where any
3 juror should be in terms of mitigating factors versus
4 facts of the murder.

5 You're leaving out entirely aggravating
6 factors which, as we all understand in this room, are the
7 things that they should be considering as compared with
8 and the junta posed with mitigating factors.

9 THE COURT: Mr. Sears.

10 MR. SEARS: I would say that I do not believe
11 -- unlike question 84 -- that this would be a question on
12 which a juror could be struck for cause based on the
13 answer solely to this question. It's significantly
14 different than the early -- earlier similarly structured
15 question about automatic killing but the way that this is
16 structured sequentially does move across the spectrum of
17 attitudes about mitigation and particularly tied, again,
18 to the findings that they made about the murder itself.
19 That's what we're looking for. That's a very subtle bias
20 as compared to, you know, some of the stuff I'm sure we're
21 going to see where people put it out there in capital
22 letters and if they had a red pen they would put it in
23 writing.

24 This is a more subtle, attitudinal basis about
25 mitigation and what they are going to do. These are

1 shades of the same issue, just kind of moving from one end
2 of the spectrum to the other and I think that I have seen
3 some great answers to these questions. Great in the sense
4 they are really illuminating about the attitude about the
5 person filling out the questionnaire.

6 This is a question that makes them think.
7 There is nothing wrong with making people thinking. This
8 is not designed to be an exercise in simplicity. This is
9 designed to get people to think before they answer
10 questions.

11 THE COURT: 92, Mr. Butner.

12 MR. BUTNER: Your Honor, what I note is that
13 -- I just had to make sure I understood my own note. I
14 think this particular question invites jury nullification
15 and certainly that is not what we want. You agree with
16 the law that requires the Judge not the jury to make the
17 decision about -- that isn't what we want.

18 We don't want to give jurors an opportunity
19 to, in essence, say, hey, I'm going to take care of this
20 problem. You know, I think this invites jury
21 nullification. That's not a good thing and it's not
22 relevant in terms of jury selection about agreement with
23 the law, so to speak. I just think that this is a bad
24 kind of a question to present to a group of jurors or
25 potential jurors.

1 THE COURT: Mr. Sears.

2 MR. SEARS: Your Honor, it's interesting that
3 -- and I guess this is why we have separate tables here
4 in the courtroom. I think that this question stands for
5 just the opposite proposition not jury nullification but
6 it's designed to get at the issues that we think should be
7 troubling to the State and to the Court.

8 If we don't want jury misconduct during
9 deliberations, this is the area, and I think we know this
10 intuitively or maybe from actual experience, that jurors
11 will have attitudes about life sentences. Some jurors may
12 have a false attitude from something they knew or heard
13 that a life sentence means you get added eight years and
14 what we're trying to do is to say here clearly what is
15 going to happen and who makes that decision because this
16 is the kind of range of things that I think the jurors
17 would think some people on the jury would think, what do
18 you mean he could get out after 25 years, you know. I
19 don't want the Judge to have that power. If that person
20 gets a life sentence, I want it to be a life sentence. I
21 won't want this person ever to be out again or they might
22 think improperly that that sounds about right and that
23 could be some kind of a safety valve in this case and I
24 think that the State would object to that.

25 And it would mean that the jurors were not

1 considering aggravation and then we don't ask them what
2 their attitude is, they may just think that, oh, the Judge
3 will take care of it and it allows them to sit on a
4 capital jury with somehow -- by somehow escaping the moral
5 and personal responsibility that's tied to that decision
6 by just thinking, well, if we go that way, the Judge will
7 figure out how it's suppose to go, whether it's life with
8 or without in this case.

9 I think that it is really important to know
10 and I think that we should all want to know and I would
11 hope that we all want to know whether there are people
12 that would be considered to sit on this jury that oppose
13 the idea of the Court making that decision notwithstanding
14 the fact it's the law. You can tell people the law but
15 getting them to understand this is a different thing.

16 For example, I remember years ago in a routine
17 case Judge Solt (phonetic) down the hall getting the
18 jurors to all agree that the Defendant need not testify.
19 And I remember I just -- out of the blue I asked them if
20 in a particular case if they figured out it was the time
21 when the Defendant had the opportunity to take the stand
22 and he didn't, was the Defendant hiding something. And I
23 got all hands, every single juror except for one raised
24 their hands and thought the Defendant was hiding
25 something. And I said what about you, sir, and he says,

1 well, it could be a lawyer's trick, and that panel was
2 struck.

3 So I think that there is a disconnect in the
4 world between telling people something and saying this is
5 the law and asking people do you agree with that. And
6 it's not jury nullification because if those people
7 disagree with the law, they are not going to be on the
8 jury. If they refuse to agree with that principal, those
9 jury nullifiers are going to be excluded. I'm sure of it.
10 And so that's why the question. And we are as interested
11 in not having those people on the jury as I would think
12 the State and the Court are. People who will not follow
13 the law because it precludes us from -- because they may
14 have one of these attitudes that I was talking about.

15 If they think that one of the options is that
16 this particular Judge could let this person out somehow in
17 25 years and they don't like that, they're going to vote
18 for death without understanding anything about the process
19 and they're not going to tell you honestly and openly that
20 they disagree with this proposition.

21 So I think it's critical to tell them what the
22 law is, tell them how the decision is made, and ask them
23 whether they are okay with that. I think it's a very
24 important question.

25 THE COURT: Anything else, Mr. Butner, on that

1 one?

2 MR. BUTNER: No.

3 THE COURT: 93. I think you have just
4 stricken in its entirety also.

5 MR. BUTNER: Right. I'll withdraw the
6 objection. Mr. Hammond really wanted to fight with me on
7 that apparently.

8 THE COURT: 94. 94. You have --

9 MR. SEARS: Judge, Mr. DeMocker pointed out a
10 typo in our version of 93 in the third line which says,
11 considering in responding to these questions, I think it
12 should say do you feel. Instead it says, do you. Y-o-u
13 should be included.

14 THE COURT: Thank you for other eyes seeing
15 grammatical errors.

16 MR. SEARS: I think we are all in agreement
17 that we're going to use the English language. Let me look
18 at the changes. I think we're okay with --

19 MR. BUTNER: It's a deletion, Mr. Sears.

20 MR. SEARS: I do see that now.

21 MR. BUTNER: Do you want me to say why?

22 MR. SEARS: Please.

23 MR. BUTNER: Judge, I think that -- I do think
24 that the way that this is written it calls for a pledge
25 from the jury, especially with the yes or no. I mean, no,

1 okay, then, you know, I agree I'll consider his personal
2 attack on character traits or, yes, I won't. I don't
3 think that that's an appropriate kind of Voir Dire
4 question. Really does elicit a pledge.

5 MR. SEARS: Your Honor, I would simply say if
6 we wanted to elicit a pledge, we would ask them to agree
7 that they would use nothing from their own history or
8 background to interfere with their ability to consider
9 evidence about Mr. DeMocker's background, that would be
10 eliciting a pledge, but asking them an open-ended question
11 about that could produce all kinds of very important
12 results about attitudes about things in this case.

13 And at this point, remember, they have about
14 two sentences worth of knowledge about this case with the
15 most generic type but they might say I am a battered woman
16 and if this is an allegation that a man killed his
17 ex-wife, I would have a very difficult time listening to
18 evidence about his background that he would present by way
19 of mitigation of that kind of a crime, that would be
20 exactly the kind of answer that we might want.

21 THE COURT: Something broader might be is
22 there anything about your own history or background that
23 would cause you difficulty in considering the evidence and
24 deciding the appropriate punishment in this case. It's
25 more open-ended without risking a pledge.

1 MR. BUTNER: Exactly. That's what I was just
2 going to point out. It isn't an open-ended question. It
3 just has that yes or no. Nothing to make it open-ended.

4 THE COURT: If so, what.

5 MR. BUTNER: Yeah.

6 MR. SEARS: That would be okay, and if so
7 what. I think that would be appropriate. An appropriate
8 addition to that, but what we're trying to do with this
9 question is tie the personal life experiences of potential
10 jurors to the possibility that they will hear something
11 about the personal life experiences of Mr. DeMocker that
12 will, for example, a battered woman comes to mind -- I'm
13 sure there are others -- that would be such a conflict to
14 them that they would just shut down and not listen to that
15 because there's just something about that and people have
16 -- people bring their own life stories to this process and
17 in traditional Voir Dire in a courtroom in a day or two,
18 there is no way, in my experience, that you're going to
19 get the level of understanding and candor from jurors that
20 you would be asking them in questions like this.

21 THE COURT: You didn't have any objection to
22 95 or 6, I think?

23 MR. BUTNER: Right.

24 THE COURT: Well, thank you.

25 MR. BUTNER: The only thing I would add,

1 Judge, is that if you note we added an oath to the end
2 which I think is important.

3 THE COURT: Yeah.

4 MR. SEARS: Which I think that's appropriate.

5 THE COURT: Thank you. It's 10 to 5. I don't
6 know if we're losing any of our defense counsel for
7 tomorrow. Is there anything that Miss Chapman that you
8 need to argue or are you with me tomorrow?

9 MS. CHAPMAN: I'll be with you tomorrow.

10 THE COURT: Thank you. Let's take a break and
11 recess for the evening and then start back up. I have an
12 8:15. We will start at 9 o'clock.

13 MR. SEARS: Thank you, your Honor.

14 (Whereupon, a brief recess was taken.)

15 THE COURT: Okay. I had recessed earlier.
16 Fortunately all attorneys and the Defendant are still
17 present. We had set or at least had planned on the
18 possibility of a number of witnesses tomorrow on
19 Defendant's motion in limine with regard to other act
20 evidence pursuant to Rule 404(B) that they filed December
21 21st. State filed a response January 4th and reply was
22 filed by the defense on January 8th. And in our
23 preliminary discussions, beginning of this week's
24 sessions, we had thought that potentially we could do a
25 404(B) hearing tomorrow.

1 Mr. Butner, you've indicated there are some
2 issues arising with regard to at least some of the prior
3 act evidence?

4 MR. BUTNER: Well, Judge, first of all, one of
5 the 404(B) witnesses that I wanted to call was Barbara
6 O'non and I had had discussions with her lawyer months ago
7 about her being a witness at trial and he indicated that
8 he would accept a subpoena and so forth -- Mr. Terribile.

9 MR. SEARS: Terribile.

10 MR. BUTNER: Okay. Thank you. Mr. Terribile.
11 And now I just found out by way of kind of a last minute
12 e-mail that she is going to be asserting her fifth
13 amendment rights and that comes as a big surprise to me.

14 I haven't had any discussion with
15 Mr. Terribile about any of that and he was aware that she
16 was going to be a witness, not in the 404(B) hearing
17 tomorrow, but a witness for months and so that's very
18 curious to me and I would like to talk to him about that.

19 THE COURT: What issues of the 11 that you've
20 listed does she pertain to?

21 MR. BUTNER: Well, Judge, I actually didn't --
22 the State listed those issues because, in essence, those
23 were the issues that were listed by the defense and I was
24 planning on discussing with Mr. Sears and have not had an
25 opportunity to discuss with him the fact that there's not

1 going to be any kind of evidence concerning some of those
2 issues. I want to go through that and get rid of them.

3 THE COURT: How does Miss O'non fit in there?

4 MR. BUTNER: Well, it's kind of complicated
5 but she is aware of his financial circumstances and, in
6 fact, was a precipitating factor in the Defendant's
7 financial circumstances and also they had an intimate
8 relationship, I have been led to believe, and so those two
9 factors are kind of significant in this case and --

10 THE COURT: Any other witnesses that were
11 coming in that have --

12 MR. BUTNER: I have not --

13 THE COURT: -- similar problems?

14 MR. BUTNER: No. There aren't any other
15 witnesses that have similar problems. I will be making
16 some proffers of evidence for 404(B) purposes and then
17 there is one other witness that I really don't want to
18 mention who that witness is yet because that witness has
19 not been disclosed -- well, the witness has been disclosed
20 but we haven't gotten any information concerning that
21 witness. At least I haven't. And we've been trying to
22 get that witness served and I want to get that information
23 and disclose it also. So that witness we have not been
24 able to serve either and we need live testimony from that
25 witness.

1 THE COURT: So the prospects of doing a 404(B)
2 hearing other than potentially offers of proof and maybe
3 some of the witnesses that you have is not going to take
4 all day, is that what you are telling me?

5 MR. BUTNER: I certainly don't believe it
6 will.

7 THE COURT: May not even take all morning.

8 MR. BUTNER: That's exactly right.

9 THE COURT: Okay. Well, I appreciate the
10 head's up on that and I'm sure that the defense also
11 appreciated the head's up on that as well. I guess, we'll
12 see ---

13 MR. SEARS: Remember, we sort of began this
14 topic by talking about the requirements of Rule 15.11 that
15 --

16 THE COURT: I'm not forgetting -- I'm not
17 forgetting about that. It's 5. I think we can discuss
18 those parts of it tomorrow.

19 MR. SEARS: What I would like to do is go as
20 far down the road as we can with this tomorrow. I'll stay
21 with Mr. Butner and we'll talk about what we can take a
22 red pen to, if that can be accomplished, but with regard
23 to anything that else that might be left, I want us to at
24 least do something on the record, whether it's a proffer
25 from the State or something about these things tomorrow,

1 if we can, because we just don't think there's another
2 time when these can be addressed.

3 THE COURT: I have a motion to quash the
4 subpoena from Mr. Terribile and I suspect that they faxed
5 that or somehow got that copied to you as well --

6 MR. BUTNER: I saw an e-mail.

7 THE COURT: -- to your office.

8 MR. BUTNER: Right. I assumed that it was
9 probably faxed or e-mail to my office.

10 THE COURT: Do you want me to address that at
11 this point or --

12 MR. BUTNER: I don't think it's a good idea to
13 talk about it at this point. I'm -- I think that we're
14 going to belabor this. We can talk about it tomorrow.
15 Probably Miss O'non won't come.

16 THE COURT: And with regard to Mr. Terribile
17 we may need to get him on the phone and have a hearing
18 with regard to this.

19 MR. BUTNER: Exactly.

20 THE COURT: Okay. All right.

21 MR. SEARS: Could we get a copy of that
22 motion? I don't know if we have a copy.

23 MR. BUTNER: Yeah, I haven't seen it either
24 Mr. Sears.

25 THE COURT: Let's see if they've -- you have

1 been -- they purport to have faxed it to the clerk, to me,
2 to Butner, to Sears.

3 MR. SEARS: Oh, okay.

4 THE COURT: So it says that so it's
5 probably --

6 MR. SEARS: I'll check my pocket fax machine
7 and see if it's there.

8 THE COURT: -- back at the office, I suspect.
9 In general, basically he's indicating a short notice is
10 problematic for him as well as her and also indicating
11 that it's not likely to accomplish anything because she
12 may assert her fifth amendment rights absent an immunity
13 agreement.

14 So with that information I'll let you all go
15 home and maybe you can see what issues still remain on the
16 404(B) matters and also see -- maybe if you want, give
17 Mr. Terrible's office a call. If you want the number it's
18 254 -- it's 602-254-5544.

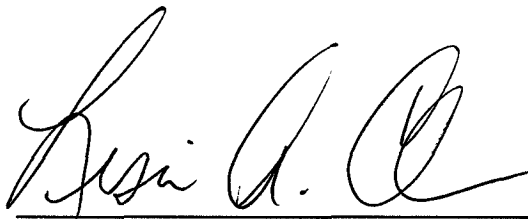
19 MR. SEARS: Thank you, Your Honor.

20 (Whereupon, the proceedings were concluded.)
21
22
23
24
25

1 R E P O R T E R ' S C E R T I F I C A T E

2
3 I, Lisa A. Chaney, a Certified Reporter, in
4 the State of Arizona, do hereby certify that the foregoing
5 pages 1 through 213 constitute a full, true, and accurate
6 transcript of the proceedings had in the foregoing matter,
7 all done to the best of my skill and ability.

8 WITNESS my hand this 23rd day of January,
9 2010.

10
11
12
13
14
15
16
17
18 

19 LISA A. CHANEY, RPR, CSR, CR
20 Certified Reporter
21 Certificate No. 50801
22
23
24
25